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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-680

RONALD R. HUTCHINSON,
Petitioner,

v.

WILLIAM PROXMIRE and
MORTON SCHWARTZ,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Petitioner Dr. Ronald R. Hutchinson respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on June 30, 1978.

OPINION BELOW

The opinion of the Court of Appeals, reported at 579 F2d 1027 (1978), appears in the Appendix hereto, along with the District Court opinion which is reported at 431 F. Supp. 1311 (1977).

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on June 30, 1978. A timely petition for rehearing en banc was denied on July 26, 1978, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Are the press releases and newsletters of a member of Congress entitled to absolute immunity under the Speech or Debate Clause of the United States Constitution?

2. Does a research scientist who has not voluntarily thrust himself into the vortex of any important public controversy become a "public figure" within the meaning of *Gertz* v. *Welch*, 418 U.S. 323 (1974), merely because his work is publicly funded, his scientific articles are published in obscure technical journals, his name occasionally appears in a small local newspaper and his reply to a Senator's attack is printed in various newspapers?

3. Does a defendant's past pattern of malicious defamation coupled with his awareness of the truth and his admitted knowledge of the falsity of some of his statements create a genuine issue of material fact as to the issue of malice?

CONSTITUTIONAL PROVISIONS INVOLVED

The Speech and Debate Clause of Article I, Section 6 of the Constitution of the United States:

> "The Senators and Representatives shall receive a Compensation for their Services . . . and for any Speech or Debate in either House, they shall not be questioned in any other Place."

The First Amendment to the Constitution of the United States:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

STATEMENT OF THE CASE

This is a civil action by a research scientist (Dr. Ronald R. Hutchinson) against a United States Senator (William Proxmire) and one of the Senator's administrative aides (Morton Schwartz), seeking damages for slander, libel, interference with contractual relations, invasions of privacy and intentional infliction of mental distress. The basis for federal jurisdiction is diversity of citizenship. As explained below, this suit involves a series of allegedly tortious statements made by the Senator and his aide in the context of several telephone calls, a press release, various press conferences, two newsletters, at least two television appearances and at least one radio broadcast.

The Plaintiff in this proceeding, and the Petitioner herein, is Dr. Ronald R. Hutchinson, a research scientist holding several academic degrees including a Ph.D. in experimental psychology from Yale University. Much of Dr. Hutchinson's professional career has been devoted to the study of aggression in humans and animals, including empirical research into possible techniques for quantitatively measuring latent stress and anger. To a large ex-

tent, this research has been facilitated through grants or contracts from various governmental agencies. It was on the basis of this funding that Dr. Hutchinson first came into contact with the Defendants.

In March of 1975, Defendant Proxmire launched a series of monthly press releases which he labeled "Golden Fleece of the Month Awards." Laden with caustic ridicule, sarcasm, and sardonic wit, these press releases were allegedly designed to attract nationwide attention to "the biggest or most ridiculous or most ironic example of government waste" which Proxmire could find each month. In connection with this monthly publicity program, Proxmire assigned his aide, Defendant Schwartz, to hunt for likely targets for the "Fleece".

During the course of his search, Schwartz discovered that a little-known scientist in Kalamazoo, Michigan had received government funding for research which involved, among other things, experiments into the measurement of latent aggression by recording the electrical impulses in the jaw muscles of laboratory monkeys under various conditions. Aware of Proxmire's bias against social scientists, Schwartz decided to focus on Dr. Hutchinson's research as a possible subject for the monthly Fleece.

As the investigation progressed, the Defendants received numerous written statements from the funding agencies explaining the value of Dr. Hutchinson's work. The statement from the National Aeronautics and Space Administration (NASA) included the following information:

"REASON FOR NASA SUPPORT OF WORK BY DR. R. R. HUTCHINSON

> "The National Aeronautics and Space Administration is sponsoring a program of research to develop improved selection and training methods for crews of space vehicles. *This will be of particular importance in possible future long-duration manned space flight.*

> Since crews would be required to live and work together in confined spaces for long periods of time, it will be important to choose people who can work together effectively.
>
> One of the first objectives of this project was to develop measurements of latent anger or aggression in order to measure the development of interpersonal hostility in normal people brought into the laboratory. It was demonstrated that at least one measure, jaw clenching, may be an appropriate indicator for this purpose. This technique records the electrical discharges from the jaw muscles (the masseters). With such recording, an indication of hostility is obtained apparently even when the person is unaware of any change in his attitude, and unaware that his jaw muscles have tightened."

NASA also informed the Defendants of certain specific uses for Dr. Hutchinson's research in connection with manned space missions.

The Office of Naval Research (ONR) also furnished the Defendants with a detailed explanation of the importance of Dr. Hutchinson's work. One significant portion of the report contains the following conclusion:

> "This research has provided the Navy for the first time with an objective scientific testing system for measuring and examining aggressive behavior, and this permits, for example, an evaluation of specific effects of various pharmaceutical agents on these behaviors. Such information could well lead to procedures which would permit control and modification of aggressive behavior in situations where that behavior would be inappropriate and disruptive.."

ONR also added a note concerning the cost of Dr. Hutchinson's reach:

> "It should be noted that Dr. Hutchinson's work was supported by the Office of Naval Research over a six-

> year period at an average of $34,500 per year for all costs, including the use of animals and overhead. This is considered a moderate expenditure by the Navy for basic research."

Another agency statement given to Proxmire and his staff explained the results of a thorough review of Dr. Hutchinson's work:

> "All reviewers recognize the value of Hutchinson's systematic, quantitative approach to an important research area that has often been plagued by subjective techniques. There was also general agreement that Hutchinson is a highly competent, hard-working, and productive investigator, and that his experiments are well designed and well executed."

In addition to these documents, other evidence of the nature and worth of Dr. Hutchinson's research was provided to Schwartz in the course of his telephone conversations with various agency officials. As Schwartz has admitted in sworn testimony, Dr. Woodward, project officer at ONR, defended Dr. Hutchinson's work and described it as "valid" and Dr. Stollnitz, an official at the National Science Foundation (NSF), emphasized the merit of the research and told Schwartz that it was "sound". In response to Dr. Stollnitz's supportive statements, Schwartz criticized the research and misrepresented R. Hutchinson's approval rate at the National Institute of Mental Health (NIMH).

Notwithstanding the abundant and *uncontroverted* evidence that Dr. Hutchinson's research was "of particular importance", "well designed", "well executed", "valid", "sound", and a "moderate expenditure", the Defendants drafted a caustic press release in anticipation of "fleecing" Dr. Hutchinson's work. The release contained several statements which Dr. Hutchinson contends were false

and defamatory, including some statements the falsity of which has been admitted by the Defendants. For example, although both Defendants admittedly knew the statement to be false, the press release charged that Dr. Hutchinson had personally received a half million dollars in research funds and had thereby "made a fortune from his monkeys." In similar fashion, the release charged that Dr. Hutchinson's projects had been "perhaps duplicative," even though the only information in the Defendants' possession with respect to possible duplication was a statement by Dr. Stollnitz of NSF that an agency study had compared Dr. Hutchinson's projects and specifically found "*no* overlap."

The release also mischaracterized the nature of Dr. Hutchinson's research and ridiculed both the doctor and his work. Focusing this ridicule on the fact that Dr. Hutchinson's experiments had involved measurements of jaw clenching as an indicator of latent aggression in laboratory monkeys, Proxmire accused Hutchinson of taking a "bite" out of the taxpayers, and he summarized seven full years of Dr. Hutchinson's scientific research as mere "monkey business" and "nonsense" which was "transparently worthless" and which had "made a monkey out of the American taxpayer." (The complete text of the press release is contained in Appendix A to the Court of Appeals' decision).

After the proposed release was drafted, Schwartz called Dr. Hutchinson and read it to him. Although Dr. Hutchinson vigorously objected to the release as inaccurate and misleading, it was nevertheless submitted to the Senate Service Department on April 15, 1975 for release to 275 members of the news media, including CBS, NBC, ABC, the major wire services, major newspapers and magazines, and also such purveyors of the news as the *National Inquirer*. As a result, the release was widely distributed and received considerable attention across the nation.

Three days later, after the press release had already received nationwide publicity, Proxmire took a copy of substantially the same statement to the Senate and either handed it to the Clerk for insertion into the Congressional Record or read it on the Senate floor. Proxmire is not certain which method he used for entering the press release into the Record.

Later in May of 1975, Proxmire mailed a newsletter to approximately 100,000 people repeating the substance of his press release and further ridiculing Dr. Hutchinson and his work. This newsletter also stated that Proxmire was pressuring various government agencies to terminate their suppoprt of Dr. Hutchinson's research:

> "I've told these government agencies it's time to get out of this 'monkey business' and put an end to worthless studies be they scientific or social." (The complete text of this newsletter is contained in Appendix B to the Court of Appeals' decision.)

In addition to his written statements, Proxmire also ridiculed Dr. Hutchinson on the Bob Barry radio program in Milwaukee (6/17/75), the nationally syndicated Mike Douglas television show (11/24/75) and on at least one other television broadcast. During his appearance on the Mike Douglas show, Proxmire described the funding of Dr. Hutchinson's research as "terrible" and noted that it was one of "the most outrageous examples of wasteful extravagant stupid spending."

During the time that Proxmire's various statements were being published throughout the country, his aide Morton Schwartz, was actively contacting the agencies which had supported Dr. Hutchinson's work and urging them to cut off funding. During several of these telephone calls, Schwartz misrepresented the facts concerning Dr. Hutchinson and his research. For example, he called Dr.

Stollnitz at NSF and falsely stated that Dr. Hutchinson had been terminated from his research position for mismanagement of funds. He also called Dr. Krasnegor at the National Institute of Drug Abuse (NIDA) and falsely stated that "NSF, ONR and NASA were all dropping support of Dr. Hutchinson's work." In addition, Schwartz called Dr. Pollin at NIDA and reminded him that NIDA had not yet received a Golden Fleece. Although Schwartz contends that this "reminder" was merely a joke, Dr. Hutchinson contends that it constituted an implicit threat. During at least one of his agency calls, Schwartz was, by his own admission, "hostile," "upset" and "angry."

Finally, in February of 1976, the Defendants issued a second newsletter of relevance to this case. The newsletter was entitled "Did the Golden Fleece Get Results?" and mentioned several projects which Proxmire had fleeced. Under the heading "Successes," Proxmire claimed credit for cutting off Dr. Hutchinson's funding and stopping his research, as follows:

> "All the studies on why monkeys clench their jaws were dropped. No more monkey business."

It is Dr. Hutchinson's contention that the above-described conduct caused severe injury to his reputation, physical illness, mental distress, and substantial loss of existing and prospective economic advantage. As a result, he filed a Complaint in the United States District Court for the Western District of Wisconsin on April 16, 1976. When the presiding Judge of that District disqualified himself, Judge Leighton of the Northern District of Illinois was designated to hear the case on behalf of the Western District of Wisconsin.

As indicated by the record in this case, the parties have filed numerous motions concerning jurisdiction, venue, extensions of time, amendment to pleadings, answers to in-

terrogatories and production of documents. For purposes of this petition, however, the only relevant motion was the motion filed by Defendant Proxmire on July 6, 1976 demanding dismissal or, in the alternative, summary judgment. This motion was based on claims of an absolute privilege under the Speech or Debate Clause (US Const., Art. I, §6), a qualified privilege under the First Amendment, and the alleged absence of any genuine issue of material fact justifying a trial on merits.

Although no hearing was ever held on this motion, the issues were addressed by the parties in detailed briefs supported by a total of 204 exhibits. After these documents were filed, the Trial Judge issued an Order on December 23, 1976 announcing that he intended to grant summary judgment in favor of Defendant Proxmire, but explaining that he would not enter a final order until a memorandum opinion had been filed. Then, on January 27, 1977, the Trial Judge ordered that the time for filing his memorandum be extended. The anticipated memorandum opinion was eventually issued on April 22, 1977 along with a "Ruling on Motion for Summary Judgment" stating that summary judgment had been entered in favor of Defendant Proxmire. Although the opinion was not entirely clear, the trial court apparently ruled that all of Proxmire's conduct was privileged under the Speech or Debate Clause and the First Amendment and also that there was no genuine issue of material fact justifying a trial on the merits. Dr. Hutchinson then filed a timely notice of appeal and Cause No. 77-1677 was docketed in the United States Court of Appeals for the Seventh Circuit.

With respect to the Co-Defendant (Morton Schwartz), who had not joined in the original motion for summary judgment, the trial court served notice that the suit against the Senator's aide would be dismissed on the Court's initiative unless Dr. Hutchinson made a showing within 30

days that such dismissal should not be ordered. Accordingly, the parties filed various briefs and several new exhibits and, on June 22, 1977, the Trial Judge issued a "Minute Order" dismissing the suit against Defendant Schwartz. No explanatory opinion was filed with the "Minute Order" and, on July 7, 1977, the Clerk of the United States District Court for the Western District of Wisconsin entered a judgment dismissing the action.

Dr. Hutchinson then filed a second notice of appeal to cover the judgment regarding Defendant Schwartz, and the same was docketed in the Seventh Circuit as Cause No. 77-1755. On Dr. Hutchinson's motion, the two appeals were consolidated on July 29, 1977.

Following the appropriate briefing and oral argument, the Court of Appeals entered a judgment on June 30, 1978, affirming the summary judgment and dismissal granted by the District Court. The grounds for the Appellate Court decision, however, were somewhat different than those expressed in the District Court opinion. Specifically, the Court of Appeals extended Speech or Debate immunity to the Defendants' press release and newsletter, but rejected the District Court's application of such immunity to the Defendants' phone calls, television appearance and radio interviews. These calls, appearances and interviews were held to be privileged under the First Amendment because, according to the Seventh Circuit, Dr. Hutchinson was a public figure and the Defendants had acted without malice.

Doctor Hutchinson was deemed to be a public figure because his research was publicly funded, he had published some scientific articles in obscure technical journals, his name had occasionally appeared in a small local newspaper and his response to Proxmire's press release was quoted in various newspapers.

On the issue of malice, the Court of Appeals found that at least some of the Defendants' statements may have been

defamatory falsehoods, but that the Defendants were immune from liability because they were supposedly unaware of the actual or probable falsity of their statements. The court never specifically addressed the affidavits concerning the Defendants' past pattern of malicious defamation or the depositions wherein the Defendants admitted having prior knowledge of the falsity of some of their statements.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Is Inconsistent With The Decisions Of This Court Defining The Scope Of Immunity Under The Speech Or Debate Clause.

The Speech or Debate Clause, US Const. Art. I §6 creates a constitutional privilege which immunizes United States Senators and Representatives from liability for statements made in the course of their deliberations as legislators. An analysis of the applicable precedent defining the scope of this immunity reveals a definite emphasis on the legislative/deliberative character of the activities to be protected. It has been uniformly held that Speech or Debate immunity applies only to those activities which are "legitimate legislative activities." *Gravel* v. *United States,* 408 U.S. 610 (1972); *United States* v. *Brewster,* 408 U.S. 501 (1972); *Tenney* v. *Brandhove,* 341 U.S. 367 (1951).

In construing the term "legitimate legislative activity," this Court has repeatedly emphasized that Congressional conduct is not immune merely because it is related to the legislative process:

> "In no case has this Court ever treated the Clause as protecting all conduct relating to the legislative process. In every case thus far before this Court the Speech and Debate Clause has been limited to an act which was clearly a part of the legislative process — the due functioning of the process." *United States* v. *Brewster,* 408 U.S. 501, 515-516.

To be deemed "legitimate legislative activity," conduct must be *necessary* to Congressional *deliberations*:

> "[T]he courts have extended the privilege to matters beyond pure Speech or Debate in either house, 'only when necessary to prevent indirect impairment of such deliberation.' *United States* v. *Doe,* 455 F. 2d at 760." *Gravel* v. *United States,* 408 at 625.

This limited category of deliberative activity has been held to include official resolutions, committee reports, voting and, of course, actual speeches and debates on the floor of Congress. *Kilbourn* v. *Thompson,* 103 U.S. 168 (1881); *Powell* v *McCormack,* 395 U.S. 486 (1969); *Cochran* v. *Couzens,* 42 F. 2d 788 D.C. Cir. (1930); *Tenney* v. *Brandhove,* 341 U.S. 367 (1951); *Gravel* v. *United States,* 408 U.S. 606 (1972); *Doe* v. *McMillan,* 412 U.S. 306 (1973). Many other Congressional activities, while entirely legitimate, are nevertheless not sufficiently legislative in character to be immune from normal legal constraints. *United States* v. *Brewster, supra,* at 512. The standard for applying the Speech or Debate Clause is neither legitimacy nor relationship to legislative activity, but rather the actual deliberative nature of the conduct itself:

> "Legislative acts are not all-encompassing. The heart of the Clause is speech or debate in either House. Insofar as the Clause is construed to reach other matters, *they must be an integral part of the deliberative and communicative processes* by which members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House." *Gravel* v. *United States,* 408 US at 625. (Emphasis Added)

In the instant case, the Court of Appeals has apparently declined to follow the rules enunciated by this Court. In its decision below, the Court of Appeals has held that the Defendants' press release and newsletters were entitled to absolute immunity under the Speech or Debate Clause, even though such political publications are clearly not "an integral part of the deliberative and communicative processes by which members participate in committee and House proceedings," as required by this Court. *Gravel* v. *United States, supra,* at 625.

Furthermore, the decision below directly conflicts with the following statement of Mr. Chief Justice Burger, speaking for a majority of this Court in *United States* v. *Brewster, supra*:

> "It is well known, of course, that Members of the Congress engage in many activities other than the purely legislative activities protected by the Speech or Debate Clause. These include a wide range of legitimate 'errands' performed for constituents, the making of appointments with government agencies, assistance in securing government contracts, preparing so-called *'newsletters'* to constituents, *news releases,* speeches delivered outside the Congress. The range of these related activities has grown over the years. They are performed in part because they have become to be expected by constituents and because they are a means of developing continuing support for future elections. *Although these are entirely legitimate activities, they are political in nature rather than legislative,* in the sense that term has been used by the Court in prior cases. But it has never been seriously contended that these political matters, however appropriate, have the protection afforded by the Speech or Debate Clause." *United States* v. *Brewster, supra,* at 512 (Emphasis added).

The inconsistency between the above-cited language and the decision below is patently obvious. Mr. Chief Justice

Burger, speaking for this Court, has specifically stated that newsletters and press releases are *not* entitled to absolute immunity under the Speech or Debate Clause, whereas the Court of Appeals in the instant case has specifically held to the contrary. In light of this conflict a Writ of Certiorari is clearly appropriate.

2. This Case Presents An Important Question Of Constitutional Law Which Has Not Been, But Should Be, Settled By This Court.

As noted in the previous section, the decision below directly conflicts with the language of this Court in *United States* v. *Brewster, supra* at 512. Technically, however, the cited language from the *Brewster* decision is only dicta, rather than binding precedent. Consequently, this Court has never specifically decided the important issue of whether Congressional press releases and newsletters are entitled to absolute immunity under the Speech or Debate Clause.

In their arguments below, the Defendants have consistently maintained the position that the dicta in *Brewster* is neither accurate nor binding nor helpful in the resolution of this significant public question. By combining various statements from a number of related Supreme Court decisions, the Defendants have argued, and apparently convinced the Seventh Circuit, that the dicta in *Brewster* misrepresents the current position of a majority of the Justices of this Court. According to the Defendants, a "new majority" of this Court has formed since the *Brewster* decision in 1972 and, consequently, the same political press releases and newsletters which were so clearly outside the Speech or Debate Clause in that year are now fully cloaked in absolute immunity.

Although Dr. Hutchinson has vigorously disputed the Defendants' convoluted arguments, it is apparent from the

decision below that the Seventh Circuit has accepted the Defendants' position. If the Defendants are correct that this Court has formed a "new majority" which has completely rejected its earlier position in *Brewster,* then it is appropriate that this radical change in the law be clearly enunciated by the Supreme Court, rather than intimated by a Court of Appeals. If, on the other hand, this Court has not reversed its position on the scope of the Speech or Debate Clause, then it should reverse the Seventh Circuit in order to maintain uniformity in the decisions on this issue. In either event, this Court should grant the instant Petition for Writ of Certiorari so that this important question of constitutional law can be directly considered and decided by this Court.

3. Decision Below Contains Inconsistencies Which Are Likely To Confuse Lower Courts And Thereby Impede The Proper Administration Of Justice.

There are at least two inconsistencies in the Court of Appeals' decision which are likely to confuse other courts unless these matters are clarified by this Court. The first inconsistency involves three separate statements by the Court of Appeals which, when read together, are apparently irreconcilable.

On page four of the decision below, the Court of Appeals correctly cites the well-recognized principle that Speech or Debate immunity is limited to "legitimate *legislative* activities." On page six of its opinion, the Court of Appeals correctly characterizes the so-called "informing function" of Congress as a "*non-legislative*" activity. Then, on page ten of its opinion, the Court of Appeals extends Speech or Debate immunity to the informing function. In other words, the Court of Appeals has set forth an erroneous syllogism, as follows:

1. Only legislative activities are immune.

2. The informing function is a non-legislative activity.
3. The informing function is immune.

The Court of Appeals' conclusion defies logic and its three statements are inherently contradictory. As a result, the decision below fails to provide adequate guidance to lower courts and is likely to create confusion as to the true status of the informing function.

Another example of an apparent inconsistency in the Court of Appeals' decision is found in its decision regarding the application of the Speech or Debate Clause to the Defendant's television and radio interviews. In its one-paragraph discussion of this issue, the Court of Appeals relies entirely on a citation to page 512 of the decision in *United States* v. *Brewster.* Based on that citation, the Court of Appeals correctly concludes that such television and radio interviews are not entitled to absolute Speech or Debate immunity.

Although the text at page 512 of the *Brewster* decision does, in fact, clearly indicate that television and radio appearances are outside the scope of the Speech or Debate Clause, it is exactly the same passage in *Brewster* which specifically states that press releases and newsletters are similarly outside the scope of immunity. Since the Court of Appeals earlier rejected the language on page 512 as being inaccurate and unpersuasive dicta, it is clearly inconsistent for the Court to then rely upon precisely the same passage as the sole support for its decision regarding the television and radio interviews.

If the decision below is allowed to stand, the above-cited inconsistencies will create uncertainty and confusion regarding the proper scope of Speech or Debate immunity. Therefore, a Writ of Certiorari should be issued in this matter.

4. The Decision Below Conflicts With The Decisions Of This Court On The Definition Of "Public Figures" Subject To The Malice Standard Of *New York Times* v. *Sullivan*.

In the decision below, the Court of Appeals applied the malice standard of *New York Times Company* v. *Sullivan*, 376 US 254 (1964), after concluding that Dr. Hutchinson was a "public figure" under *Curtis Publishing Company* v. *Butts*, 388 US 133 (1967) and its progeny. A careful analysis of the Court of Appeals' decision, however, reveals that it is in conflict with the decisions of this Court regarding the proper definition of the term "public figure."

In defining the class of "public figures" who must demonstrate "actual malice" (i.e., knowing falsity or reckless disregard of the truth), this Court has enunciated the following rule:

> "For the most part, those who attain this status [i.e., public figures] have assumed rules of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly those classed as public figures have thrust themselves to the forefront of a particular public controversy in order to influence the resolution of the issues involved. In either event, they invite attention and comment." *Gertz* v. *Welch*, 418 US 323 (1974).

In the instant case, it is undisputed that Dr. Hutchinson did not assume any role of especial prominence in the affairs of society and it is obvious that he never thrust himself to the forefront of any particular public controversy in order to influence the resolution of the issues involved. Consequently, Dr. Hutchinson is not a public figure as that term has been defined by this Court. The Court of Appeals, however, found that Dr. Hutchinson was a public figure because his research work was publicly funded, his scientific articles were published in obscure technical journals, his name occasionally appeared in a small local newspaper and his reply to the Defendants' press release was printed in various newspapers. In basing its decision on these factors, the Court of Appeals has essentially rejected the standards enunciated in *Gertz* v. *Welch*, *supra*, and resurrected the discredited standard of *Rosenbloom* v. *Metromedia, Inc.*, 403 US 29 (1971).

In *Rosenbloom*, a plurality of this Court expressed the opinion that the *New York Times* test applied to any "private person involved in a matter of public interest." This standard, however, was specifically rejected in *Gertz* v. *Welch*, *supra*, where this Court concluded that:

> "The extension of the *New York Times* test proposed by the *Rosenbloom* plurality would abridge this legitimate state interest to a degree that we find unacceptable."

Thus, under *Gertz*, it is clear that a private individual such as Dr. Hutchinson does not become a public figure merely because his research is publicly funded.

It was equally contrary to the *Gertz* standard for the Court of Appeals to elevate Dr. Hutchinson to the status of a public figure merely because his scientific articles were published in obscure technical journals and his name occasionally appeared in a small local newspaper. In the *Gertz* case, the Plaintiff-Petitioner was described as follows:

> "Petitioner has long been active in community and professional affairs. He has served as an officer of local civil groups and of various professional organizations, and he has published several books and articles on legal subjects. Although Petitioner is consequently well-known in some circles, he has achieved no general fame or notoriety in the community."

From this description, it is clear that Mr. Gertz enjoyed greater prominence than Dr. Hutchinson and yet this Court specifically held that it was "*plain* that petitioner was *not* a public figure." Obviously, the Court of Appeals in the instant case has applied a different standard in determining that Dr. Hutchinson's limited publications made him a public figure. The articles which he published were all printed in obscure technical journals which received little or no public attention. Furthermore, the so-called "stories" which appeared in "local papers" were all printed in one small Kalamazoo newspaper and normally consisted of one or two paragraph routine announcements inconspicuously printed in the back pages of the paper among the obituaries and the want ads. If this type of "press coverage" is sufficient to satisfy the "public figure" standard, as the Court of Appeals has held, then the rigorous standard of *New York Times* v. *Sullivan* must necessarily apply to every eagle scout, accident victim or club secretary whose name is ever printed in a newspaper. This conclusion, although mandated by the Court of Appeals' decision, is clearly contrary to the standards enunciated by this Court.

The final factor mentioned by the Court of Appeals involved the fact that Dr. Hutchinson's reply to Proxmire's press release was printed in various newspapers. According to the Court of Appeals, Dr. Hutchinson's denial of the Defendant's statement satisfied the requirement that a public figure have "sufficient access to the means of counterargument to be able to expose through discussion the falsehood and fallacies of the defamatory statements." *Curtis Publishing Company* v. *Butts, supra,* at 155. The Court of Appeals conveniently overlooks the fact that Dr. Hutchinson was unable to respond on the Mike Douglas Show, the Bob Barry Show, or in a Congressional newsletter. Apparently, the Court of Appeals believes that any person

who is defamed automatically becomes a public figure if his denial is mentioned by the press. If this standard is accepted, however, virtually anyone who is ever publicly defamed by a United States Senator will automatically become a public figure. This will occur not by virtue of the victim's status, but by virtue of the persuasive power and influence of the person making the defamatory statements. Thus, the Court of Appeals' decision has basically turned *Gertz* on its head and adopted a completely different definition of the term, public figure.

In *Gertz* v. *Welch, supra,* this Court limited public figure status to the type of person who has "voluntarily exposed himself to increased risks of injury from defamatory falsehoods." This Court should uphold that restrictive definition of public figure status and should grant the instant petition in order to eliminate the conflict between its decisions and the decision below.

5. The Decision Below Is Based Upon Several Serious Misstatements Of Fact And Therefore Constitutes A Gross Miscarriage Of Justice.

Certain critical portions of the Court of Appeals' decision in the instant case are based upon erroneous factual assumptions. For example, in deciding whether this case presents a serious question of material fact as to the issue of malice, the Court of Appeals stated that "Defendants' exhibits include correspondence from agencies which criticize Plaintiff's research technique and project costs. (Defendants' Exhibit 90)." This statement is undeniably false. In fact, Defendants' Exhibit 90 is a letter from the National Institute of Mental Health concerning a research *proposal.* The agency concluded that "the quality of the proposal was far below that of [Dr. Hutchinson's] published work," and therefore declined to fund that particu-

lar proposal. No actual research was ever discussed or criticized in this agency letter.

This factual error is significant because the Court of Appeals relies upon Defendants' Exhibit 90 to demonstrate that the Defendants were faced with conflicting evidence concerning the quality of Dr. Hutchinson's work. Since Defendants' Exhibit 90 did not criticize any of Dr. Hutchinson's actual research, it is clear from the other exhibits and from the Defendants' depositions that the Defendants were not faced with conflicting evidence concerning the quality of Dr. Hutchinson's work but, on the contrary, were in possession of voluminous documents, all of which indicated the falsity of the Defendants' statements. Since the Defendants have admitted their awareness of these documents and have admitted spending a substantial amount of time reviewing these documents prior to issuing their defamatory statements, it appears that there is, at a minimum, a genuine issue of material fact as to whether the Defendants acted in reckless disregard of the truth contained in the agency documents. Since the Court of Appeals' decision on this matter was based upon the erroneous assumption of a divided record, justice mandates that this case be reversed and remanded.

Another misstatement of fact in the Court of Appeals' decision appears in that Court's discussion of the Defendants' press release. There, the Court of Appeals correctly notes that *Doe* v. *McMillan,* 566 F. 2d 713 (D.C. Cir. 1977), Cert. 98 S. Ct. 1607 (1978) extended Speech or Debate immunity only to the 'limited distribution'' of materials ''within the legitimate needs of the Congress.'' After stating that correct rule, however, the Appellate Court committed gross error in finding that the instant case involved ''the limited facilitation of press coverage.'' Contrary to the Court of Appeals' ascertion, it is undisputed that the press coverage of the Defendants' new release was

far from limited. The Defendants' release was submitted to two hundred and seventy-five members of the news media, including CBS, NBC, ABC, all the major wire services, all the major newspapers and magazines, and even the *National Inquirer.* This wide-spread distribution stands in stark contrast to the limited distribution protect in *Doe* v. *McMillan, supra,* where the court specifically noted that ''no attempt [was] made to call attention to the report or its contents.'' Here, virtually every conceivable attempt was made to call attention to Proxmire's press release through the use of television appearances, radio interviews, newsletters, etc. It is certainly a gross inaccuracy to refer to this conduct as ''the limited facilitation of press coverage.''

Still another serious misstatement of fact in the Court of Appeals' decision appears on page 13 where the Court concludes that ''there is no question that Defendant did not have knowledge of the actual or probable 'falsity' of their statements.'' This statement is directly contrary to the evidence in this case. On pages 15 and 21 of Defendant Proxmire's deposition, he admits having actual knowledge that the federal funds in question were not paid directly to Dr. Hutchinson as he falsely stated in his press release. He further admits actual knowledge that the institutions receiving the funds, and not Dr. Hutchinson, had control over the expenditure of these grants. Likewise, on page 63 and 96 of his deposition, Defendant Schwartz has admitted having actual knowledge, prior to the issuance of the press release, that his statement concerning payments to Dr. Hutchinson was false. Moreover, Dr. Hutchinson presented various affidavits demonstrating that the Defendants had actual or probable notice of the falsity of their statements prior to the time of publication. In light of these facts, the above-quoted statement of the Court of Appeals is clearly erroneous.

Since the misstatements cited in this section concern facts critical to the decision of this case, it would be manifestly unjust to allow the Court of Appeals' decision to stand. In order to prevent this gross miscarriage of justice, the instant petition for Writ of Certiorari should be granted and this Court should summarily vacate the judgment below and remand the case for further consideration.

6. The Decision Below Involves Important Principles Of Constitutional Law Having Extraordinary Public Significance.

The instant case is of exceptional importance because it has attracted wide-spread public attention and because it concerns significant constitutional issues of the highest order which directly affect the rights of American citizens to seek judicial redress for tortious injuries inflicted upon them by members of Congress.

If the decision below is not considered and reversed, its broad extension of Speech or Debate immunity could have a profound impact on our society. For example, it could give an overwhelming political advantage to all incumbent candidates by enabling them to maliciously defame their opponents with total impunity. The door would be opened to political character assassination with the simple proviso that all such attacks be printed in the form of a press release or a newsletter.

In the absence of potential liability for defamation, there would be no effective legal deterrent against the intentional publication of defamatory falsehoods by members of Congress. As knowledge of this absolute immunity becomes known to average citizens, it would be logical to expect that the public credibility of members of Congress would be substantially eroded. These are only some of the potential ramifications of the Court of Appeals' decision in the instant case.

With respect to the First Amendment issue, the decision below, if allowed to stand, could signal a return to the previously rejected standard of *Rosenbloom* v. *Metromedia, supra* and, consequently, a serious infringement on the legitimate state interest in the protection of reputation.

The extraordinary constitutional significance and public importance of these issues clearly demonstrates a compelling need for review by this Court.

CONCLUSION

For the foregoing reasons, Dr. Ronald R. Hutchinson hereby respectfully prays that his petition for Writ of Certiorari be granted.

Respectfully submitted,

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Dated: October 19, 1978

APPENDIX A — Opinion Of The United States District Court For The Western District Of Wisconsin Dated April 22, 1977.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

(Before the Honorable George N. Leighton,
United States District Judge, Northern District of Illinois,
sitting by designation)

RONALD R. HUTCHINSON,
Plaintiff,

vs. 76-C-257

WILLIAM PROXMIRE and MORTON SCHWARTZ,
Defendants.

MEMORANDUM

I.

This is a suit by a research scientist against a United States Senator, and one of his administrative assistants, seeking eight million dollars in damages for alleged slander, libel, malicious interference with contractual relations, malicious conduct or conduct with grossly negligent disregard for the truth, invasion of rights to privacy, and intentional infliction of emotional anguish. Jurisdiction is invoked under 28 U.S.C. §1332(a)(1). When this suit was filed the presiding district judge recused himself, and this court was appointed to sit by designation.

Thereafter, the United States Senator moved, in the alternative, for summary judgment. Therefore, the question

to be decided is whether the motion, pleadings, depositions, exhibits, and affidavits disclose there is no genuine issue of material fact and that movant is entitled to judgment as a matter of law. However, to answer this question, this court must resolve three issues. 1. Whether the investigative activities of the United States Senator in connection with his duties as a member of Senate subcommittees were privileged. 2. Whether a press release issued by the United States Senate Service Department and containing the substance of a Senate floor speech by the United States Senator was privileged under the speech or debate clause of the United States constitution. 3. Whether the statements made by the United States Senator to his constituents and in a television appearance were libelous or defamatory. The material facts are as follows.[1]

II.

The plaintiff, Dr. Ronald R. Hutchinson, is a research scientist, president of the Foundation for Behavioral Research, a non-profit organization, former director of research at Kalamazoo State Hospital, Fort Custer State Home, and former adjunct associate professor of psychology at Western Michigan University. From 1966 to 1975, he directed research projects under federal grants from the National Aeronautics and Space Administration (NASA),

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[1] This court acknowledges the invaluable assistance of Ms. Emily Nicklin, a third year student at the University of Chicago Law School, who did the underlying research, analysis of the cases, and the preliminary papers for this Memorandum. The caliber of her work reflects the high standards that characterize American legal education and the ability of the young men and women who are preparing to enter our profession.

the National Institute for Mental Health (NIMH), the National Institute for Drug Abuse (NIDA) and the Office of Naval Research (ONR). These projects were investigations into various aspects of animal and human aggression.

Defendant William Proxmire is the senior United States Senator from Wisconsin. Among his congressional duties is service on subcommittees of the Senate Committee on Appropriations which have jurisdiction and review of budget and appropriations for ONR, NASA, NSF, NIDA, and NIMH. As a member of these subcommittees, he votes on appropriations for government obligations and makes recommendations regarding expenditures. Defendant Morton Schwartz is Senator Proxmire's administrative assistant in legislative matters. His duties included research into efficiency in domestic government spending so that he could make recommendations to his superiors on the desirability of particular appropriations.

Early in 1975, Senator Proxmire directed his staff to gather information on wasteful government spending and provide him with at least one example each month so he could dramatize it, call it to the attention of his colleagues, and thus discourage it. To this end, while speaking on the Senate floor in March, 1975, he established what he called the "Golden Fleece of the Month Award," a program through which he made monthly announcements of wasteful government spending identified by his staff. These announcements were routinely accompanied by a press release publicizing his selection for the award.

The Senate Service Department, under the Senate Sergeant-at-Arms, duplicates and distributes senatorial press releases after reviewing them for conformity with Senate regulations governing use of the mailing frank. Senator Proxmire's office routinely supplies the Service Department with a copy of a proposed release and a list of distributees composed at the Senator's direction with the view

toward conveying information to his constituents, to interested segments of the news media, and his colleagues, either directly or through their constituents. Senator Proxmier established and approved the procedure by which his news releases were sent to the Senate Service Department for duplication and distribution.

In March 1975, Mr. Schwartz learned of Dr. Hutchinson's research from Dr. D. Greenburg, editor of a social science publication who had read of plaintiff's work in NTIS, a weekly abstract of government studies and publications. The NTIS abstract referred to two publications by NASA giving details of Dr. Hutchinson's research, both of which Mr. Schwartz subsequently obtained by mail from NASA's Congressional Liaison Officer, Mr. William Allen. The NASA publications cited other research conducted by plaintiff with grants from ONR, NSF, and the Michigan State Department of Mental Health. Mr. Schwartz contacted ONR and NSF seeking information concerning this research. He spoke with Dr. Robert Woodward of ONR and Mr. Richard Wilson, Congressional Liaison Officer for NSF, inquiring into their reasons for supporting Dr. Hutchinson's projects. At all times, he identified himself as a member of Senator Proxmire's staff. Mr. Schwartz' review of the documents he obtained uncovered one grant to the plaintiff by NIMH, and the additional information that NIMH had rejected all but one 1962 research application Dr. Hutchinson had made to that agency. Having decided that the federal fundings of plaintiff's research constituted a potential "Golden Fleece of the Month Award," Mr. Schwartz spent approximately forty hours over a four-week period reviewing documents and preparing a draft of his findings. During this time, he contacted various state and federal agencies to inquire about the structure of the fundings and to determine their justification.

On or about April 11, 1975, defendant Schwartz telephoned NIMH, and was informed by Mr. Joseph Bracket that other than an expired 1962 grant, plaintiff's research had not been funded by that agency. After this inquiry, Dr. Hutchinson received from NIMH an $11,554 three-year grant commencing on June 1, 1975. Three days later, Mr. Schwartz made telephone calls to various agencies. He contacted the Michigan State Department of Mental Health to inquire about the structure of plaintiff's state fundings. He telephoned NIDA where he was informed that it did not fund any of plaintiff's projects.[2] He telephoned Mr. Fred Stollnitz of NSF and discussed the possibility of that agency receiving a Golden Fleece of the Month Award for its part in the funding of plaintiff's research. Mr. Stollnitz' telephone log of the conversation reveals that Mr. Schwartz criticized the NSF funding, stating that plaintiff's research was obvious and duplicatively funded by ONR; and that NIMH had not granted plaintiff any funds. On April 15, Mr. Schwartz telephoned Mr. Stollnitz to inform him that NSF would definitely receive the award and made comments about what he called Dr. Hutchinson's "grantsmanship." This having been done, a draft of the "Golden Fleece of the Month Award" for April 1975 was prepared and submitted for review by Senator Proxmire and Mr. Howard Shuman, another of his administrative assistants. After some editing, the award draft was finalized and approved. A copy of the news release concerning the award

[2] Since the Golden Fleece Award was given to agencies funding plaintiff's research, he has received at least three federal grants: from NASA for one year commencing February 1, 1976, in the sum of $25,000; from NIDA for six months commencing May 30, 1975, in the sum of $54,800; and from NIMH for three years commencing June 1, 1975, in the sum of $11,554.

was sent to the Senate Service Department by Mr. Shuman on April 15 for release on the morning of April 18, 1975.[3]

On or about April 15, Mr. Schwartz telephoned Dr. Hutchinson, told him of the planned Golden Fleece Award, and read him the text of the press release. Plaintiff objected because he thought it did not fairly evaluate his work, and that his name was misspelled. As was his custom, Senator Proxmire made the award the subject of a Senate floor speech in which he stated that NSF, ONR, and NASA had spent:

> "almost $500,000[4] in the last seven years to determine under what condition rats, monkeys, and humans bite and clench their jaws. From the findings of these studies, it is clear that the government paid a half a million dollars to find out that anger, stopping smoking, and loud noises produce jaw clenching in people .... All this money went to Dr. Roland [sic] R. Hutchinson of Kalamazoo State Hospital in Michigan .... Dr. Hutchinson's studies should make the taxpayer as well as his monkeys grind their teeth. In fact, the good doctor has made a fortune from his monkeys and in the process made a monkey out of the American taxpayer .... In view of the transparent worthlessness of Hutchinson's studies ... it is time we put a stop to the bite Hutchinson and the bureaucrats who fund him have been taking out of the taxpayer."

[3] The release is set out in full as Appendix A to this Memorandum.

[4] There are various estimates of how much federal money plaintiff actually received. Senator Proxmire states that plaintiff received $910,500; plaintiff says that the sum is $820,500.

In the next newsletter he mailed to his constituents following the release, Senator Proxmire told them of the April award. The news item was in the following language:

ROMANTIC LOVE STUDIED

Each month I have decided to offer a "golden fleece" award to the organization or person who has most utterly wasted your tax dollars.

Last month's award went to the National Science Foundation for a study of why people fall in love. For $84,000 the researchers were supposed to find out how people grow dependent upon each other in what they called "romantic love."

Not only is this a question that cannot be answered, like what is infinity, I'm not sure we want an answer. There should be some mysteries in life.

A BITE OUT OF YOUR POCKETBOOK

This month the award is shared jointly by the National Science Foundation, National Aeronautics and Space Administration and the Office of Naval Research. These three organizations have put up $500,000 of your tax money to reach the astounding conclusion that people and monkeys clench their jaws when angry or forced to stop smoking or confronted with loud noise.

In seven years of work by Dr. Ronald R. Hutchinson of Michigan, your money was used to discover that people get angry when they feel cheated and they tend to clench their jaws or even scream and kick. Did you know that? Did you know that monkeys become angry when they are given electric shocks? Or that drunk monkeys do not react as quickly as sober monkeys? That's what your taxes paid for!

Dr. Hutchinson has received one grant after another from various federal bureaucracies to study these earth shaking problems. He has examined crayfish, wasps, boa constrictors, turtles, alligators, opossums, foxes, pigeons, rats, monkeys and humans to discover under what circumstances th show signs of being angry.

TESTS ON ANIMALS

He has "stimulated" the animals by using physical blows, electric tail shocks, intense heat, brain probing, air blasts, foot shocks and loud noises. He has influenced them with morphine, tranquilizers, food, alcohol, caffeine and in the case of humans, with money.

He graduated from animals to humans in 1970. That's when he began to conclude that humans bite and clench their jaws under stress. And that when they feel cheated, they react by screaming and kicking on occasions.

These studies are continuing and several new proposals, if accepted, will mean another $150,000 for this program.

If this use of your tax money makes you want to kick and scream or clench your jaws, then join the club. The good doctor has made a monkey out of the federal bureaucrats.

I've told these government agencies it's time to get out of this "monkey business" and put an end to worthless studies be they scientific or social.

If you have any suggestions for my next "golden fleece" award, please write to me in Washington.

On at least one other occasion, Senator Proxmire mentioned plaintiff by name to his constituents and commented on what he thought was useless research at the expense of taxpayers. And on the same subject, he made some unspecified statements to a District of Columbia reporting firm, contributed to or authored an article in a popular publication called "Human Events Magazine" and gave an interview to "Behavior Today," a journal that publishes articles on subjects within the spectrum of the behavioral sciences. In the meantime, either Senator Proxmire personally, or his assistant Mr. Schwartz, made follow-up inquiries of federal and state agencies concerning their reaction to the April Golden Fleece of the Month Award.

Then on November 24, 1975, Senator Proxmire appeared on the Mike Douglas Show, a nationally televised interview program, and described his "Golden Fleece of the Month Award[s]." In response to questions, he gave three examples; and without naming him, alluded to Dr. Hutchinson's research, saying that one of the awards had been for

> " . . . a study that cost $500,000 to find out why people, rats and monkeys clench their jaws. They found out they clench their jaws when they were angry, when they were prodded by sticks, when they were hungry, and they didn't clench their jaws as much if they had been drinking."

III.

The complaint that began this suit, originally in three counts with a fourth added by amendment, attaches the April 18, 1975 press release as an exhibit and alleges it contained untrue statements and omitted others so that the release incorrectly or falsely summarized studies with the result that Senator Proxmire, his agents and employees libeled, slandered and defamed him by implying that he

improperly or illegally profited personally from his governmental research grants; that defendants' telephoning of various federal agencies and attempting to persuade or pressure them to terminate existing grants or contracts for research, prejudiced and prevented plaintiff from obtaining other grants or contracts from fedaral agencies in the future; that Mr. Schwartz in contacting the federal agencies involved identified himself as Senator Proxmire's staff member and uttered or published slanderous, libelous and defamatory statements which were false regarding plaintiff and threatened or implied to those agencies that if they continued funding of plaintiff's research they would receive Senator Proxmire's "Golden Fleece of the Month Award"; that as a result of defendants' actions, plaintiff lost research funding from various federal agencies, lost the respect of his profession, was subjected to humiliation, held up to public scorn, suffered extreme mental anguish, injury to his feelings, physical illness and pain to his person, accompanied by loss of income and ability to earn money in the future; and that defendants' conduct intentionally violated and infringed plaintiff's right to privacy, his right to peace of mind and tranquility, for which conduct plaintiff seeks judgment against defendants, jointly and severally, in the sum of $8,000,000.

Senator Proxmire's alternative motion for summary judgment concedes as true the issuance of the press release, his investigative activities and those of his administrative assistant, the newsletters to constituents containing statements about Dr. Hutchinson, and the appearance in the Mike Douglas television show accompanied by the statement concerning the Golden Fleece Award for April 1975. The Senator, however, insists that summary judgment in his favor must be entered because the alleged misconduct was legitimate legislative activity and accordingly absolutely privileged by virtue of the speech or debate

clause of the United States Constitution, article I, section 6. He argues that the conduct falls within the investigative or informing functions of Congress, and was related to public contracting and expenditures which are at the heart of congressional business. He insists that his statements and criticisms concerning the use of public funds were privileged under the free speech clause of the First Amendment to the United States Constitution. He says that (1) Dr. Hutchinson, as a recipient of public funds, was and is both a public official and a public figure; and (2) there is no factual basis to support a judgment for the plaintiff in this case because (a) his statements accurately and truthfully reported the public contracting involved; (b) the record demonstrates an absence of malice; that is, knowledge of falsity or reckless disregard of the truth; (c) during his television appearance he did not make any statements that constituted actionable libel, defamation or slander; and (d) Mr. Schwartz' communications with government officials administering public funds were privileged. The motion, contention and argument are supported by a well-documented brief, affidavits, 72 exhibits and references to depositions.

Dr. Hutchinson meets this motion with counter-affidavits, 96 exhibits, and a well-written brief containing two arguments that raise what is claimed to be material issues of fact which can only be resolved by a trial. The counter-affidavits are those of fellow scientists familiar with Dr. Hutchinson's work, government evaluations of his research, newspaper articles about the plaintiff, and a number of scientific papers authored by him. From this, he argues that the conduct of Senator Proxmire and his administrative assistant was not legitimate legislative activity and therefore not privileged under the speech and debate clause. Plaintiff declares that his complaint is not directed at any speech on the floor of the Senate; it is at the libel by re-

publication contained in the press release of April 18, 1975, that contained in newsletters to the Senator's constituents, the allegedly defamatory statement Senator Proxmire made during the Mike Douglas Show, the comments concerning plaintiff to news reporters, and communications with various federal agencies and their staffs. Dr. Hutchinson argues for a restrictive application of the speech or debate clause which, he insists, is mandated by decisions of the United States Supreme Court in a number of its recent pronouncements on the subject.

IV.

A.

The speech or debate clause of the federal constitution provides, in pertinent part, that " . . . Senators and Representatives . . . for any Speech or Debate in either House, . . . shall not be questioned in any other Place." U.S. Const. art I, sec. 6. In *Kilbourn* v. *Thompson,* 103 U.S. 168 (1880), for the first time, the Supreme Court dealt with a challenge to the immunity conferred by the clause. There, a congressional committee witness who refused to deliver certain documents to the committee was ordered taken into custody. He brought suit for false imprisonment against the House Sergeant-at-Arms and members of the House of Representatives who had voted for the order. It was held that in ordering the witness' imprisonment, the House had exceeded its authority; but that the speech or debate clause precluded imposition of liability on the congressmen who voted for the arrest, even though they had violated the witness' constitutional rights. The Court said:

> "It would be a narrow view of the constitutional provision to limit it to words spoken in debate. The reason of the rule is as forcible in its application to written reports presented in that body by its committees,

> to resolutions offered, which, though in writing, must be reproduced in speech, and to the act of voting. . . . In short, to things generally done in a session of the House by one of its members in relation to the business before it." 103 U.S. at 204.

Thus, actions within the legislative role were held to be within the ambit of the privilege. And consistent with this holding, the Supreme Court has reaffirmed that once it is determined a member of Congress is acting within a "legitimate legislative sphere," the speech or debate clause is an absolute bar to interference. *Eastland* v. *United States Servicemen's Fund,* 421 U.S. 491, 503 (1975), citing *Doe* v. *McMillan,* 412 U.S. 306, 314 (1973). The standard for invoking congressional immunity under article I, section 6 of the Constitution is the standard of legitimate legislative activity. In the event of a suit, once it is determined that the conduct complained of meets that standard, the action must be dismissed. The Court has said:

> "[L]egislators acting within the sphere of legitimate legislative activity 'should be protected not only from the consequences of litigation's results but also from the burden of defending themselves.' *Dombrowski* v. *Eastland,* [387 U.S. 82, 85 (1967)] . . . [A] private civil action, whether for an injunction or damages, creates a distraction and forces Members to divert their time, energy, and attention from their legislative tasks to defend the litigation. Private civil actions also may be used to delay and disrupt the legislative function. Moreover, whether a criminal action is instituted by the Executive Branch, or a civil action is brought by private parties, judicial power is still brought to bear on Members of Congress and legislative independence is imperiled." *Eastland* v. *United States Servicemen's Fund,* 421 U.S. 491, 503 (1975).

Although it is certain that legitimate legislative activity is within the privilege, considerable confusion exists as to what constitutes legitimate legislative activity because there are expansive dicta and a multiplicity of views in the cases examining various conduct alleged to be protected by the clause. Although the Supreme Court has always insisted that the clause must be read "broadly to effectuate its purpose," *United States* v. *Johnson,* 383 U.S. 169, 180 (1966), recent cases appear to adopt a restrictive view of what is legitimate legislative activity.

The conduct of Senator Proxmire and his administrative assistant can be divided into phases for the purpose of determining applicability of the speech or debate clause:

(1) investigation into federal funding of Dr. Hutchinson's research;

(2) delivery of a speech on the Senate floor by the Senator; and issuance of a press release reciting the facts and content of the Senate speech;

(3) follow-up investigation by the Senator's staff and by him at appropriation hearings; and

(4) the Senator's statement on the Mike Douglas Show, his newsletter to constituents, and his other comments about the plaintiff.

As to the investigation into federal funding of Dr. Hutchinson's research, the Supreme Court has always recognized the authority of Congress to investigate. In *Watkins* v. *United States,* 354 U.S. 178 (1957), dealing with the appeal from a conviction for contempt of Congress, the Court stated:

> "The power of Congress to conduct investigations is inherent in the legislative process. That power is broad. . . . It comprehends probes into departments

> of the Federal Government to expose corruption, inefficiency or waste. But, broad as is this power of inquiry, it is not unlimited. There is no general authority to expose the private affairs of individuals without justification in terms of the functions of the Congress. . . . No inquiry is an end in itself; it must be related to, and in furtherance of, a legitimate task of the Congress. Investigations conducted solely for the personal aggrandizement of the investigators or to "punish' those investigated are indefensible." 354 U.S. at 187.

In this case, Senator Proxmire serves on several subcommittees of the Senate Committee on Appropriations. These subcommittees review the budgets of the various agencies with which Dr. Hutchinson has contracted. As a member of these subcommittees, Senator Proxmire votes on appropriations, makes recommendations regarding the distribution of government funds, and concerns himself with their expenditure. Therefore, his inquiries, and those of his administrative assistant, into how American taxpayers' moneys are spent by the agences over which the subcommittees in question had jurisdiction were privileged as legitimate legislative activity under the *Kilbourn* test of "things generally done in a session of the House by one of its members in relation to the business before it." 103 U.S. at 204. This being the case, the court will turn to the issue whether as to Senator Proxmire, the April 18, 1975 press release was also privileged under the speech or debate clause.

B.

The most recent Supreme Court pronouncements on the subject of legitimate legislative activity in the context of republication of congressional activity are *Gravel* v. *United States,* 408 U.S. 606 (1972), and *Doe* v. *McMillan,* 412 U.S. 306 (1973). These pronouncements have an important bearing on the issue to be resolved.

In *Gravel,* the government sought to subpoena a Senator's aide and compel him to testify before a grand jury investigating the release and republication of certain classified documents, the Pentagon Papers. It appears that Senator Gravel had convened a subcommittee meeting and had read extensively from the classified materials. He then inserted a forty-seven volume study into the Congressional Record and, some weeks later, arranged for their republication by a private printing company. The Senator, as intervenor, moved to quash the subpoena and to require the government to specify the questions it was going to ask his aide, contending that requiring the aide to testify would violate the speech or debate clause. In a six to three decision, the Supreme Court agreed with Senator Gravel, holding that the speech or debate clause extended immunity to both him and his aide with respect to events which occurred in preparation for the conduct of the subcommittee meeting. However, the Court held that there was no immunity with respect to arrangements the Senator had made for private republication of the Papers. With regard to the immunity that extended to the Senator's aide, the Court said,

> "[I]t is literally impossible, in view of the complexities of the modern legislative process, with Congress almost constantly in session and matters of legislative concern constantly proliferating, for Members of Congress to perform their legislative tasks without the help of aides and assistants; . . . the day-to-day work of such aides is so critical to the Members' performance that they must be treated as the latter's alter egos; and . . . if they are not so recognized, the central role of the Speech or Debate Clause — to pre-

vent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary [citation omitted] — will inevitably be diminished and frustrated." 408 U.S. at 616-617.

The court emphasized that aides are only protected insofar as they "perform or aid in the performance of legislative acts." 408 U.S. at 618. Thus, they are protected only to the extent they perform acts which would be privileged were the legislator-superior to perform them.

In holding that the privilege precluded questioning of either the Senator or his aide about the subcommittee meeting, but not about the arrangments for private republication, the Court found that the subcommittee meeting easily met the *Kilbourn* test of acts "generally done in a session of the House by one of its members in relation to business before it." 408 U.S. at 624. The Court assumed that action taken in committee was legitimate legislative activity, without examining its relationship to pending legislation or ordinary committee business. Arrangements for private republication of the Papers were found not to meet the test because they were unrelated to the legislative process. 408 U.S. 625-26. The court warned:

> "Legislative acts are not all-encompassing. The heart of the Clause is speech or debate in either House. Insofar as the Clause is construed to reach other matters, they must be an integral part of the deliberate and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House." 408 U.S. at 625.

Private republication, the Court found, was not central to Senate deliberations; consequently, a grand jury inquiry into arrangements for private republication did not threaten Senate independence by "impermissibly" exposing Senate deliberations to executive influence. 408 U.S. at 625.

In *Doe* v. *McMillan*, 412 U.S. 306 (1973), parents of children in the District of Columbia school system brought a class action alleging that the release and publication of a congressional committee report on the District of Columbia school system revealed embarrassing information about individually named children, infringed their right to privacy, damaged their mental and physical health, and harmed their reputations and future careers. The parents sought to enjoin further publication, and recover compensatory and punitive damages. The defendants, among others, included (1) the Chairman and members of the House Committee on the District of Columbia; (2) various committee staff members; and (3) the Superintendent of Documents and the Public Printer.

The District Court dismissed the complaint as to all defendants; the Court of Appeals affirmed; the Supreme Court affirmed in part and reversed in part, holding that the complaint was barred by the speech or debate clause "insofar as it sought relief from the Congressmen-Committee members, from the Committee staff, from the consultant, or from the investigator, for introducing material at Committee hearings that identified particular individuals, for referring the report that included the material to the Speaker of the House, and for voting for publication of the report." 412 U.S. at 312. These acts, and distribution of the report, the Court said, were "legislative acts." 412 U.S. 312. It recognized explicitly that, constitutionally, there was no judicial authority to oversee the judgment of the Committee with respect to the utility or necessity of

including the names of particular children in the report. 412 U.S. at 313.

However, the Court refused to extend the privilege to non-legislator personnel who published the report for the purpose of informing the public about congressional business. Therefore, it found that the Superintendent of Documents and the Public Printer enjoyed no immunity to carrying out the directions given them to publish the report, although Congressmen and their staffs were immune from suit for ordering the publication that went beyond the requirements of the legislative function. In holding liable those who, at the direction of Congress, distributed actionable material to the public, the Court commented:

> "To hold otherwise would be to invite gratuitous injury to citizens for little if any public purpose. We are unwilling to sanction such a result, at least absent more substantial evidence that, in order to perform its legislative function, Congress must not only inform the public about the fundamentals of its business but also must distribute to the public generally materials otherwise actionable under local law." 412 U.S. at 316-17.

The "informing function" of Congress was not undermined by the holding, the Court insisted, because congressional materials such as reports are available for inspection by the press and the public. 412 U.S. at 317.

The dissent in *Gravel* joined the *Doe* majority with Justice Douglas' concurring opinion emphasizing that:

> "We all should be painfully aware of the potentially devastating effects of congressional accusations. . . . There can be no question that the [Senate] resolution authorizing the investigation and study expressed a legitimate legislative purpose. Nevertheless, neither the investigatory nor, indeed, the informing function of Congress authorizes any 'congressional power to expose for the sake of exposure'." 412 U.S. at 329, 330, (citing *Watkins* v. *United States,* 354 U.S. 178, 200 (1957).)

Three members of the *Gravel* majority, Chief Justice Burger and Justices Blackmun and Rehnquist, dissented. They argued that the speech or debate clause should be read to cover preparation, content, and publication of any committee report, once it is determined that it was properly authorized by Congress and had a valid legislative purpose. 412 U.S. at 331 *et seq.* Therefore, *Doe* v. *McMillan* suggests a restrictive view of what constitutes legitimate legislative activity in the context of private defamation actions. By distinguishing between the Congressmen and their staff, on the one hand, and the Public Printer and the Superintendent of Documents, on the other, the Court has made it clear that authorizing and requesting distribution of a privileged speech or document may not be made the basis of civil or criminal liability, while distribution by non-legislators may lead to liability because the privilege of the speech or debate clause does not apply.[5]

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[5] In other cases, the Court has shown a willingness to impose liability on those who act at the direction of legislators, while protecting the legislators themselves. See, *e.g., Powell* v. *McCormack,* 395 U.S. 486 (1969), where certain House members, the House Sergeant-at-Arms, and the House Doorkeeper were sued for violating constitutional rights; House members held immune under speech or debate clause, Sergeant-at-Arms and Doorkeeper held not immune for carrying out House members' orders; *Dombrowski* v. *Eastland,* 387 U.S. 82 (1967), where legislators and their counsel accused of participation in conspiracy to violate constitutional rights, legislators held immune

In the case at bar, Senator Proxmire resists liability for the press release on two grounds, one of which is compatible with *Gravel* and *Doe*. First, he argues that no liability can be imposed upon him for authorizing the release because the subject matter of the statement, appropriations and expenditures, is within his immediate jurisdiction as a member of the various subcommittees on appropriations. Hence, his conduct is absolutely privileged, as were the action of the subcommittee members in *Doe*. Second, he insists that his authorization of the press release is immune because it is an exercise of the "informing function." Congress has enacted legislation to establish guidelines and mechanisms for distribution of various materials. The franking statute, 39 U.S.C. §3210 (1970), promotes the "informing function" by authorizing free use of the mails. The statute specifically includes press releases and newsletters " . . . which may deal with such matters as the impact of laws and decisions on State and local governments and individual citizens; reports on public and official actions taken by Members of Congress; and discussions of proposed or pending legislation or govenmental actions and the positions of Members of Congress on, and arguments for or against, such matters." 39 U.S.C. §3210 (3)(B). Moreover, Congress has established an administrative procedure for policing possible abuses of the franking privilege. See 2 U.S.C. §501, *et seq.*

Lower courts have recognized the legitimacy of the "informing function" as a legislative activity in actions involving alleged abuses of the franking privilege. In *Hoellen* v. *Annunzio*, 348 F. Supp. 305 (N.D. Ill. 1972), *aff'd* 468 F.2d 522 (7th Cir. 1972), *cert. denied*, 412 U.S. 953

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[5] (Continued)
under clause, no immunity necessarily extended to their counsel; *Kilbourn* v. *Thompson*, 103 U.S. 168 (1880).

(1973), the district court held that the use of the frank to send constituents questionnaires which contained the defendant-Congressman's photograph was a legitimate mailing "upon official business" in the exercise of the "informing function." See *Bowie* v. *Williams*, 351 F. Supp. 628 (E.D. Pa. 1972). For these reasons, this court is constrained to agree with Senator Proxmire. The speech or debate clause of the constitution renders him immune from liability to Dr. Hutchinson for his authorization of the press release of April 18, 1975. That press release, in a constitutional sense, was no different than would have been a television or radio broadcast of his speech from the Senate floor.

C.

The remaining issue is whether Senator Proxmire's statement on the Mike Douglas Show, his newsletter references to Dr. Hutchinson's research and fundings, his comments to news reporters and in interviews either mentioning Dr. Hutchinson by name or alluding to his work, were libelous or defamatory. Resolution of this issue depends on Dr. Hutchinson's position in his community, and the interest of the public in the research projects for which he had received federal funding.

In *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), the Supreme Court held that the First Amendment provides a conditional immunity from liability in libel actions brought by public officials. The Court ruled that to preserve free, uninhibited discussion of public issues, a newspaper could not be held liable for publishing a defamatory falsehood about a public official unless the plaintiff demonstrated with "convincing clarity" that the publication was made with "actual malice"; that is, actual knowledge of falsity or reckless disregard of the truth. 376 U.S. at 279-

80. In *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130 (1967), the Court extended New York Times to actions brought by "public figures," persons who are "intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large." 388 U.S. at 164 (Warren, C.J., concurring). The test formulated in *New York Times* represents recognition that freedoms of speech and press are essential to open discussion of public issues, freedoms our founding fathers deemed fundamental for the continued existence of our governmental system. *New York Times* v. *Sullivan*, 376 U.S. at 270. The test recognizes that:

> "erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive' . . . . " *Id.* at 271-72.

Soon after this extension, a plurality of the Court held in *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29 (1971), that the *New York Times* test applied whenever the publication concerned matters of general or public interest, without regard to the plaintiff's position in his community. 403 U.S. at 43. This holding was abandoned in *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974), where it was decided that a publisher is liable to a public figure "only on clear and convincing proof that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth." 418 U.S. at 342. However, in the case of private individuals, a less demanding standard is constitutionally permissible. At least where the substance of the defamatory statement makes substantial danger to reputation apparent, states may define for themselves the appropriate standard of liability, provided they do not impose liability without fault. 418 U.S. at 347, 348. However, states may not permit recovery of presumed or punitive damages, at least where liability is not based on a showing of "actual malice" as defined by *New York Times*. *Id.* at 349.

It is not easy to determine whether a plaintiff is a public figure or a private individual. As one court has wryly observed, "Defining public figures is much like trying to nail a jellyfish to the wall." *Rosanova* v. *Playboy Enterprises, Inc.*, 411 F. Supp. 440, 443 (S.D. Ga. 1976). In a recent decision, *Time, Inc.* v. *Firestone*, 424 U.S. 448 (1976), the Supreme Court held that the plaintiff was not a public figure since she had not assumed any role of "especial prominence in the affairs of society . . . ." *Id.* at 453. The fact that she had held press conferences during a well-publicized divorce proceeding was insufficient to make her a public figure for the purpose of determining the constitutional protection afforded the defendant's report of her divorce.

The term "public figure" has been variously defined. In *Gertz*, the Court stated that "[t]hose who, by reason of the notoriety of their achievements or the vigor and success with which they seek the public's attention, are properly classed as public figures . . . " 418 U.S. at 342. Designation as a public figure:

> " . . . may rest on either of two alternative bases. In some instances an individual may achieve such pervasive fame or notoriety that he becames a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. In either case such persons assume special prominence in the resolution of public questions." *Gertz* v. *Robert Welch, Inc.*, 418 U.S. at 351.

The court added:

> "Absent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life. It is preferable to reduce the public-figure question to a more meaningful context by looking to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation." *Id.* at 352.

Lower court determinations regarding the public figure status of a plaintiff in a defamation action have followed the Court's suggestion and examined the plaintiff's role in the controversy out of which the defamation arises. See, generally, Annot., 75 A.L.R. 3d 616 (1977). In *Rosanova* v. *Playboy Enterprises, Inc.*, 411 F. Supp. 440 (S.D. Ga. 1976), the court concluded that the plaintiff was a public figure for purposes of a libel action based on defendant's magazine article identifying him as a "mobster" because over the years he had voluntarily engaged in a course of conduct bound to invite attention and comment through his voluntary contacts with organized crime figures. In *Hotchner* v. *Castillo-Puche*, 404 F. Supp. 1041 (S.D.N.Y. 1975), the plaintiff was found to be a public figure for purposes of libel action based on defendant's book about Ernest Hemingway. Although the plaintiff's name was not well known in the community, he had successfully published a number of widely distributed works based on his relation with Hemingway, and was thus found to have injected himself into controversies surrounding the later years of the novelist's life, a matter of considerable public interest. In a number of other cases, and on varying facts, courts in different parts of the country have reached the same conclusion. *Guitar* v. *Westinghouse Elec. Corp.*, 396 F. Supp. 1042 (S.D.N.Y. 1975), *aff'd*, 538 F.2d 309 (2d Cir. 1976);

Buchanan v. *Associated Press*, 398 F. Supp. 1196 (D.D.C. 1975); *Fram* v. *Yellow Cab Co.*, 380 F. Supp. 1314 (W.D. Pa. 1974); *Meeropol* v. *Nizer*, 381 F. Supp. 29 (S.D.N.Y.), *pet. denied*, 508 F.2d 837 (2d Cir. 1974). The question whether the *New York Times* test applies to a case is one of law. "[I]t is for the trial judge in the first instance to determine whether the proofs show [plaintiff] to be a [public figure or a] 'public official'." *Rosenblatt* v. *Baer*, 383 U.S. 75, 88 (1966); *Rosanova* v. *Playboy Enterprises, Inc.*, 411 F. Supp. 440, 444 (S.D. Ga. 1976); *Hotchner* v. *Castillo-Puche*, 404 F. Supp. 1041, 1045 (S.D.N.Y. 1975).

Here, Dr. Hutchinson argues that he is not a public figure because he has never voluntarily exposed himself to extensive public attention, nor assumed any role of special prominence in the affairs of society, nor thrust himself to the forefront of public controversy. He contends that the media coverage of his research before the "Award" was limited to brief articles in largely local newspapers. Moreover, he argues that because of the information for these articles was solicited from him by the News and Publications' Department of Western Michigan University which provided him with 'forms' for reporting on his work to the media, he did not initiate media coverage and hence did not invite public attention and comment.

Senator Proxmire contends that in the area of criticism, the merit of publicly-funded studies, plaintiff has sought and acquired a public standing and reputation. He was published widely in the scientific community, claiming more than forty behavioral science articles. Except for the period 1960-61, he has been employed as a research scientist at various public institutions. Since 1966, his achievements, grants and studies have been the subject of media coverage. Defendant argues that this media coverage indicates not only that plaintiff is a public figure but that he solicited that status through press releases and interviews.

Given Dr. Hutchinson's long involvement with publicly-funded research, his active solicitation of federal and state grants, the local press coverage of his research, and the public interest in the expenditure of public funds on the precise activities in which he voluntarily participated, the court concludes that he is a public figure for the purpose of this suit. As he acknowledged in his deposition, "Certainly, any expenditure of public funds is a matter of public interest."

He is also, in the judgment of this court, a public official. *See generally Annot.*, 19 A.L.R.3d 1361 (1968). Although the Supreme Court has never articulated the limits of this classification, *Rosenblatt* v. *Baer*, 383 U.S. 75 (1966), offers some guidance. There, the Court held that the *New York Times* test was applicable to a libel action brought by a former supervisor of a county recreation area who was appointed by and responsible to three county commissioners. The alleged libel had criticized fiscal management under the plaintiff's regime. The Court stated:

> "The thrust of *New York Times* is that when interests in public discussion are particularly strong, as they were in that case, the Constitution limits the protections afforded by the law of defamation. Where a position in government has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees, . . . the *New York Times* malice standards apply. . . . The employee's position must be one which would invite public scrutiny and discussion of the person holding it, entirely apart from the scrutiny and discussion occasioned by the particular charges in controversy. *Id.* at 86, 86-87, fn. 13.

In *Aday* v. *United Action for Animals*, 361 F. Supp. 457 (S.D.N.Y. 1973), *aff'd*, 493 F.2d 1397 (2d Cir. 1974), *cert. denied*, 419 U.S. 842 (1974), the district court found that the plaintiff, a research scientist employed by NASA and involved in planning a space flight for a monkey, was both a public figure and a public official for the purpose of an action based on allegedly defamatory remarks about his treatment of experimental animals. In this case, Dr. Hutchinson held the important public position of director of research at the Kalamazoo State Hospital in Kalamazoo, Michigan; he was dealt with as a responsible public official by the federal agencies that funded his research; and he holds himself out as the President of a not-for-profit corporation that purports to act in the public interest. Therefore, at the times relevant to this controversy he held "a position in government * * * [with] such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it . . . . " *Rosenblatt* v. *Baer*, 383 U.S. 75, 86 (1966).

This important fact appears from the affidavits, exhibits, and excerpts from depositions that support the motion for summary judgment; and consequently, the question arises; has Dr. Hutchinson made a sufficient showing that there is a genuine issue of material fact with regard to actual malice on the part of Senator Proxmire; i.e., knowledge on his part of the falsity of what he said, or a reckless disregard by him of the truth, when he made the statements about which complaint is made? The showing of malice may not be presumed but must be proved by the plaintiff. *Time, Inc.*, v. *McLaney*, 406 F.2d 565, 572 (5th Cir. 1969), *cert. denied*, 395 U.S. 922 (1969). A bare allegation of malice, standing alone, is not sufficient to withstand a motion for summary judgment. *Fram* v. *Yellow Cab Co.*, 380 F. Supp. 1314, 1335 (W.D. Pa. 1974); *Goldman* v. *Time, Inc.*, 336 F. Supp. 133, 138 (N.D. Cal. 1971).

Rule 56(e) of the Federal Rules of Civil Procedure requires a party opposing a motion for summary judgment to show specific facts, admissible in evidence, which establishes that there is a genuine issue for trial. Moreover, under *New York Times*, the standard of proof plaintiff must meet at trial is more than a preponderance of evidence; it is a showing of defendant's actual knowledge of falsity or reckless disregard of the truth by "clear and convincing evidence." *Vandenburg* v. *Newsweek, Inc.*, 507 F.2d 1024, 1026, 1029 (5th Cir. 1975); see *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 279-80 (1964); *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 342 (1974).

"Knowledge of falsity" presumably means just what it says: subjective awareness by the defendant that his statements were false. "Reckless disregard of the truth," on the other hand, has been defined by several Supreme Court decisions to require that the defendant act with a "high degree of awareness of . . . probable falsity." *Beckley Newspapers Corp.* v. *Hanks*, 389 U.S. 81, 84 (1967); *Garrison* v. *Louisiana*, 379 U.S. 64, 74 (1964). In the leading case of *St. Amant* v. *Thompson*, 390 U.S. 727 (1968), the Court found the "reckless disregard" requirement unsatisfied where the defendant had published defamatory falsehoods about the plaintiff without personal knowledge of the matter published. The Court said,

> " . . . reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. . . . The finder of fact must determine whether the publication was indeed made in good faith. Professions of good faith will be unlikely to prove persuasive . . . where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call. Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation. Likewise, recklessness may be found where there are obvious reasons to doubt to veracity of the informant or the accuracy of his reports." 390 U.S. at 731, 732.

Measured by this standard, it is clear that Dr. Hutchinson's allegations of libel and defamation fall short. His arguments that he was subjected to these torts proceed, basically, along these lines: failure to investigate; unfair editing in disregard of the facts before defendants; and republication after plaintiff complained about the press release of April 18, 1973. From *St. Amant*, it is clear that failure to investigate is insufficient to establish reckless disregard to the truth. Moreover, the record shows that Mr. Schwartz, on behalf of Senator Proxmire, spent approximately forty hours over a four week period gathering and reviewing agency documents regarding plaintiff and making a draft of his findings. During that time, he contacted various state and federal agencies to verify his findings and to inquire about the justification for the funding in question. Senator Proxmire and his administrative assistant, Howard Shuman, reviewed Mr. Schwartz' findings. Before publishing the release, Schwartz telephone plaintiff to read him the text of the release and ask him if there were any factual misstatements. Dr. Hutchinson said that the intended release did not fairly evaluate his research, but corrected only a misspelling of his name.

The charge now being made that defendants' unfair editing in disregard of the facts before them is also insufficient to establish actual malice. Undoubtedly, editing involves making choices; but selective reporting will not support a

finding of reckless disregard of the truth. Summarizing plaintiff's research for the purpose of making some statement about its federal funding will not rise to the level of falsification. In *Time, Inc.* v. *Pape,* 401 U.S. 279 (1971), a magazine reported as a charge by the United States Commission on Civil Rights an incident of police brutality which the Commission itself, in its report, characterized as the allegations of a civil rights complaint. Notwithstanding the fact that the reporters themselves were aware that the Commission attributed its account of the incident to a court complaint, the Court held that the failure to include such a secondary attribution in the article was not 'falsification' sufficient in itself to sustain a jury finding of 'actual malice'." 401 U.S. at 289. It would appear that an error in interpretation of ambiguous documents, such as the conglomeration of plaintiff's grants and publications, through the adoption of one of several rational alternatives, is insufficient to create a jury issue.

Moreover, Dr. Hutchinson's claim with regard to unfair editing and summarization of his research is not buttressed by Senator Proxmire's characterizations as "nonsense" and "transparently worthless" or the suggestion that the news release gives the false impression of $500,000 having been paid personally to plaintiff; and that he was making a fortune from government money. In *Greenbelt Cooperative Publishing Ass'n, Inc.* v. *Bresler,* 398 U.S. 6 (1970), plaintiff was a land developer who was seeking zoning variances from a town which was in turn attempting to buy land from him. He used his position as seller to strengthen his position in requesting the variances. Defendant-newspaper had reported third-persons' characterizations of plaintiff's conduct as "blackmail." The Court held that, as a matter of constitutional law, the use of the word "blackmail" in this context was not libelous:

> "[E]ven the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered [plaintiff's] negotiating position extremely unreasonable." 398 U.S. at 14.

Here, too, it would appear that Senator Proxmire's statement, "the good doctor has made a fortune from his monkeys and in the process made a monkey out of the American taxpayer" is, at worse, no more than rhetorical hyperbole. Compare *Time, Inc.* v. *Johntson,* 448 F.2d 378 (4th Cir. 1971).

Defendant's republication of the allegedly defamatory remarks after plaintiff complained about the release also appear insufficient to raise a jury issue of actual malice. Defendants Proxmire and Schwartz believed the statements to be true when made and still believe them to be true. Nothing in either defendant's affidavit or deposition indicates that they ever entertained any doubt as to the truth of their statements.

The constitutional privilege of *New York Times* mandates summary judgment once it becomes clear that a plaintiff cannot establish the actual malice required for recovery in defamation action of this nature. *Meeropol* v. *Nizer,* 381 F. Supp. 29, 32, fn. 1 (S.D.N.Y. 1974), *pet. denied,* 508 F.2d 837 (2d Cir. 1974). However, " '[o]n a motion for a summary judgment the burden of establishing the non-existence of any genuine issue of fact is upon the moving party, *all doubts are resolved against him,* and his supporting affidavits and depositions, if any, are carefully scrutinized by the court'." *Rose* v. *Bridgport Brass Co.,* 487 F.2d 804, 808 (7th Cir. 1973) [citations omitted]. But the court has a special responsibility here to determine if there is any genuine dispute because of the danger that speech may be chilled by the mere fact of litigation. *Guam Fed. of Teach-*

ers, Local 1581, A.F.T. v. *Ysrael,* 492 F.2d 438 (9th Cir. 1974), *cert. denied,* 419 U.S. 872 (1974); *Oliver* v. *Village Voice, Inc.,* 417 F. Supp. 235, 237 (S.D.N.Y. 1976). The court must make a threshold determination, before trial, whether there has been a showing of actual malice. *Bon Air Hotel* v. *Time, Inc.,* 426 F.2d 858, 864 (5th Cir. 1970); *Wasserman* v. *Time, Inc.,* 424 F.2d 920, 922 (D.C. Cir. 1970) (Wright, J. concurring), *cert. denied,* 398 U.S. 340 (1970). "[I]n making this determination, the granting of summary judgment may well be the 'rule' rather than the 'exception'." *Oliver* v. *Village Voice, Inc.,* 417 F. Supp. 235, 237 (S.D.N.Y. 1976); *Guitar* v. *Westinghouse Elec. Corp.,* 396 F. Supp. 1042, 1053 (S.D.N.Y. 1975), *aff'd* 538 F.2d 309 (2d Cir. 1976); see also, *Perry* v. *Columbia Broadcasting System, Inc.,* 499 F.2d 797 (7th Cir. 1974), *cert. denied,* 419 U.S. 883 (1974); *Cervantes* v. *Time, Inc.,* 464 F.2d 986 (8th Cir. 1972), *cert. denied,* 409 U.S. 1125 (1973); *Washington Post Co.* v. *Keogh,* 365 F.2d 965, 968 (D.C. Cir. 1966), *cert. denied,* 385 U.S. 1011 (1967).

But even if for the purpose of this suit it is found that Dr. Hutchinson is a private person so that First Amendment protections do not extend to Senator Proxmire and his administrative assistants, relevant state law dictates the grant of summary judgment. In a diversity action, under the doctrine of *Erie R. Co.* v. *Tompkins,* 304 U.S. 64 (1938), a federal court must apply the conflict of laws doctrine of the state in which it sits. *Klaxon Co.* v. *Stentor Elec. Mfg. Co.,* 313 U.S. 487 (1941). Thus, sitting in Wisconsin where the suit is filed, this court must look to the choice of law principles of this jurisdiction to determine what state law to apply. In *Wilcox* v. *Wilcox,* 26 Wis. 2d 617, 133 N.W.2d 408 (1965), the Wisconsin Supreme Court abandoned the *lex loci delicti* approach to choice of law problems in tort cases and adopted the general approach of *Babcock* v. *Jackson,* 12 N.Y.2d 473, 240 N.Y.S.2d 743, 191

N.E.2d (1963). It has since elaborated on the new method of analysis and adopted "choice-influencing" considerations which are "Predictability of results, Maintenance of interstate and international order, Simplification of the judicial task, Advancement of the forum's governmental interests, Application of the better rule of law." *Conklin* v. *Horner,* 38 Wis.2d 468, 157 N.W.2d 579, 583 (1968); accord, *Heath* v. *Zellmer,* 35 Wis.2d 578, 151 N.W.2d 664 (1967). It is not certain what law Wisconsin would apply in this case, using these "choice-influencing" considerations; but it appears the option is logically limited to the law of two jurisdictions, that of, the District of Columbia, the place where defendants work and their allegedly wrongful conduct originated, or of Michigan, the plaintiff's domicile, where the injury presumably had effect. For application of the relevant law, the conduct consisted of (1) the April 18, 1975 press release and the newsletters to constituents; (2) the Mike Douglas Show appearance and the other alleged defamations, some of them unspecified. However, under the law of either jurisdiction, Dr. Hutchinson cannot recover in this case.

In the District of Columbia, an alleged defamatory publication must be construed in the sense in which readers to whom it is addressed would ordinarily understand it. "The publication is to be read as a whole . . . . If after an examination of the entire article there is only one reasonable interpretation of its meaning, it is for the judge . . . to say whether or not the words are defamatory." *Johnson* v. *Johnson Publishing Co.,* 271 A.2d 696, (D.C. Ct. App. 1970). Only if a publication is libelous *per se,* are questions of malice, truth, and privilege for the jury. Restatement (Second) of Torts, an authority that is followed in the District of Columbia, *Harmon* v. *Liss,* 116 A.2d 693 (D.C. Mun. 1955); Restatement (Second) of Torts §569, Comment b (Tent. Draft No. 21, April 5, 1975) suggests that the only

effect of a finding that a publication is libelous *per se* is to place the burden of establishing truth or privilege on the defendant; and recognizes that liability may be imposed only on a showing that defendant actually knew of the falsity and defamatory nature of his statements, or recklessly disregarded the truth, or acted negligently in failing to ascertain the facts. Based on these principles, it is clear that in the District of Columbia, neither the press release and newsletters nor the statements attributed to Senator Proxmire or members of his staff constitute actionable libel or defamation.

This conclusion is supported by the unmet averments of Mr. Schwartz and those of persons in state and federal agencies with whom he spoke during his investigation of Dr. Hutchinson's federal funding; but particularly, by the recognition in the District of Columbia of a defense to an action for defamation based on the doctrine of fair comment. In *Fisher* v. *Washington Post Co.*, 212 A.2d 335 (D.C. Ct. App. 1965), an action by an art gallery owner against a newspaper based on allegedly libelous comments about the manner in which the gallery presented its paintings, the court held that the doctrine of fair comment was applicable. The court defined the doctrine:

> "Fair comment or criticism on a matter of public interest is not actionable so long as the comment is not motivated by malice . . . . So long as the comment is the speaker's actual opinion, based on fact, about a matter of public interest, the words are protected unless they are grounded in malice or go beyond a discussion of the public works or acts of the subject of the opinion. . . . Fair comment is a complete defense . . . and the words are not made actionable by the fact that the complaining party is injured in his business reputation. . . . The fair comment defense goes only to opinions expressed by the writer and does not extend to misstatements of fact." *Id.* at 337.

In the case here, the fair comment doctrine is a complete defense to Dr. Hutchinson's action with regard to the statements contained in the April 1975 press release and the newsletters. The disposition of public funds is clearly a matter of public interest; and the opinions expressed were based on facts researched by Senator Proxmire's assistant, the defendant, Mr. Schwartz. Under these circumstances, the release and newsletters did not have to include all the facts on which the opinions were based, "[s]o long as the facts are available to the public, the criticism is within the doctrine of fair comment." *Fisher* v. *Washington Post Co.*, 212 A.2d 335, 338 (D.C. Ct. App. 1965).

It is also clear that in the District of Columbia the brief and innocuous statement Senator Proxmire made on the Mike Douglas Show did not constitute defamation, nor did any of the other statements about which Dr. Hutchinson complains. The law of the jurisdiction requires that in a suit for defamation there be proof of certainty as to the person defamed before liability can be imposed. Restatement of Torts §564(b) (1938). The person defamed need not be specifically named; but the surrounding circumstances must be such that there is no doubt in the hearer's mind as to the person's identity. *Harmon* v. *Liss*, 116 A.2d 693, 695 (D.C. Mun. App. 1955), citing Restatement of Torts §564(b). In this case, the statement on the Mike Douglas Show did not name Dr. Hutchinson or even describe him with the clarity that would suggest a jury verdict against Senator Proxmire. The other statements were similarly innocuous.

Under the law of Michigan, Dr. Hutchinson fares no better. That state recognizes a rule of qualified privilege for all *bona fide* communications concerning any subject in

which the party communicating has an interest, or in reference to which he has a legal, moral or social obligation to a person having a corresponding interest or duty. *Timmis* v. *Bennett,* 352 Mich. 335, 89 N.W.2d 748, 753 (1958); *Bufalino* v. *Maxon Bros., Inc.,* 368 Mich. 140, 117 N.W.2d 150 (1962). This rule was applied in *Timmis* v. *Bennett, supra,* an action by a police officer against an attorney for libel in a letter referring to conduct of the city's law enforcement. The court found that the rule included "statements made in good faith by a citizen . . . having, or claiming to have, special knowledge . . . bearing on [a] matter of public concern and communicated to others concerned or interested." 89 N.W.2d at 755. The court explained the procedural consequences of a finding of qualified privilege, saying,

> "The meaning in law of a privileged communication is that it is made on such an occasion as rebuts the *prima facie* inference of malice arising from the publication of matter prejudicial to the character of the plaintiff, and throws upon him the *onus* of proving malice in fact, but not of proving it by extrinsic evidence only. . . . The effect, therefore, of showing that the communication was made upon privileged occasion is *prima facie* to rebut the quality . . . of malice [in law] and casts upon the plaintiff the necessity of showing malice in fact, — that is, that the defendant was actuated by ill will in what he did and said, with a design to causelessly or wantonly injure the plaintiff, — and this malice in fact, resting, as it must, upon the libelous matter itself and the surrounding circumstances tending to prove fact and motive, is a question to be determined by the jury. The question whether the occasion is such as to rebut the inference of malice if the communication be *bona fide* is one of law for the court, but whether *bona fides* exist is one of fact for the jury, [citations omitted] *Id.* at 753-54;

> accord *Harrison* v. *Arrow Metal Products Co.,* 20 Mich. App. 590, 174 N.W.2d 875 (1969).

Timmis indicates that the doctrine of qualified privilege applies in Michigan for the same reasons that the doctrine of fair comment applies in the District of Columbia. Thus, the burden is on Dr. Hutchinson to resist the motion for summary judgment by showing that in the trial of this case there will be evidence of malice in fact or ill-will. He cannot simply rest on his pleadings, but must make this showing once it is established that the occasion in question was privileged. In *Nuyen* v. *Slater,* 372 Mich. 654, 127 N.W.2d 369, 373 (1964), where summary judgment for defendant was affirmed, the Supreme Court of Michigan said that "[i]f the circumstances relied on as showing malice are as consistent with its nonexistence as with its existence, the plaintiff has not overcome the presumption of good faith [established by defendant's showing of a qualified privilege] and there is nothing for the jury." No such showing has been made here by Dr. Hutchinson with regard to the press release or the newsletter.

As to the statement made on the Mike Douglas Show, and those claimed by Dr. Hutchinson to have been made on other occasions, it appears that the law of Michigan, like that of the District of Columbia, requires certainty as to the person allegedly defamed before liability may be imposed. In *Lewis* v. *Soule,* 3 Mich 514, 521 (1855), the Supreme Court of Michigan said that

> "[T]he true test is . . . whether those who are acquainted with the person libelled, upon hearing the charge, are able to make the application. . . . Men generally talk, and write, to be understood; and when they design to speak of and concerning an individual, they either refer to him by name, or connect him with some fact or circumstances, by which those addressed, un-

derstood who is to be designated. That fact or circumstances must be known by those to whom the communication is made; otherwise, nothing is communicated."

V.

It follows, then, that in this summary judgment proceeding, the motion, pleadings, depositions, exhibits, and affidavits disclose there is no genuine issue of material fact to be resolved between the parties. The conduct about which Dr. Hutchinson complains is admitted by the defendant, Senator Proxmire. On the facts alleged in the complaint, indeed the only facts on which the plaintiff can base any claim for relief, it matters not whether he was a public figure, a public official or a private person. Therefore, this court concludes that defendant is entitled to judgment as a matter of law; and this is true whether the law applied in this case is that of federal jurisdictions, the District of Columbia where the conduct complained of originated, or that of the state of Michigan where Dr. Hutchinson lives and the claimed injury presumably was felt. *Bon Air Hotel Inc.* v. *Time, Inc.*, 426 F.2d 858 (5th Cir. 1970); *Perry* v. *Columbia Broadcasting System, Inc.*, 499 F.2d 797 (7th Cir. 1974); *Washington Post Company* v. *Keogh*, 365 F.2d 965 (D.C. Cir. 1956); *Nuyen* v. *Slayter*, 372 Mich. 654, 127 N.W.2d 369 (1964).

Accordingly, summary judgment will be entered in favor of the defendant Senator William Proxmire and against the plaintiff Dr. Ronald R. Hutchinson. And since on the facts alleged a claim cannot be stated on which relief can be granted against the remaining defendant, Mr. Morton Schwartz, this court serves notice on the plaintiff that because of the inadequacy of the complaint, it will, on its own initiative, dismiss the suit as to Mr. Schwartz, unless a showing is made within 30 days that such dismissal should not be ordered. *Literature, Inc.* v. *Quinn*, 482 F.2d 372

(1 Cir. 1973); *Dodd* v. *Spokane County, Washington*, 393 F.2d 330 (9th Cir. 1968).

So ordered

(s) George N. Leighton

Dated: April 22, 1977

APPENDIX A

Office of
SENATOR WILLIAM PROXMIRE
Wisconsin

FOR RELEASE AFTER 6:30 A.M. FRIDAY,
APRIL 18, 1975

Senator William Proxmire (D. Wis) announced on Friday, "My choice for the Golden Fleece Award for the biggest waste of taxpayers' money for the month of April goes jointly to the National Science Foundation, National Aeronautics and Space Administration and the Office of Naval Research for spending almost $500,000 in the last seven years to determine under what conditions rats, monkeys and humans bite and clench their jaws. From the findings of these studies it is clear that the Government paid a half million dollars to find out that anger, stopping smoking, and loud noises produce jaw clenching in people."

The Wisconsin Senator said, "This is the second in a series of 'fleece of the month' awards which will climax in a Biggest Waste of the Year Award.

"All this money was given to Dr. Roland R. Hutchinson of Kalamazoo State Hospital in Michigan. Last year alone the good doctor spent over $200,000 of which more than $100,000 were federal funds. And what are some of the other results reached by these research projects in the last seven years?

"Dr. Hutchinson told NASA that people get angry when they feel cheated and tend to clench their jaws or even scream and kick. NSF learned that Dr. Hutchinson's monkeys became angry when they were shocked and would try to get away from the shock. In addition, NSF was informed that drunk monkeys do not usually react as quickly or as often as sober monkeys and that hungry monkeys get angry more quickly than well-fed monkeys.

"The Office of Naval Research appears to have gotten the same type of so-called research as did the NSF and NASA.

"It is very interesting to trace the history of these extremely similar and perhaps duplicative projects. In 1967, NSF gave Dr. Hutchinson $44,700 to study 'Environmental and Physiological Causes of Aggression.' For two years, Dr. Hutchinson studied the biting reactions of monkeys when they received electric shocks. He also compared their reaction while being given a number of different drugs as alcohol and caffeine. In 1969, the NSF gave Dr. Hutchinson another $26,000 to continue these experiments. He received another grant, this one for $51,200 in 1970 from the NSF.

"By this time Dr. Hutchinson was ready to extend his work to human biting and jaw clenching. In 1970, Dr. Hutchinson received a grant which ran for five years from the ONR to continue 'research on subhuman primates to determine the environmental, physiological and biochemical factors responsible for the maintenance of aggressive behavior and systematic replication of results obtained in

primates extended to human subjects.' Total funding from the Navy ran to $207,000.

"During this period, Dr. Hutchinson applied for and received a $50,000 grant from NASA to develop measurements of latent anger or aggression in humans by means of jaw-clenching. In addition, Dr. Hutchinson received his fourth NSF grant in 1972 for $51,800 in order to continue his experiments on monkeys and extend the work to human jaw-clenching.

"Dr. Hutchinson, who in addition to being Research Director at Kalamazoo State Hospital, is also an Adjunct Professor at Western Michigan University and President of his own non-profit Foundation for Behavior Research, has proposals presently pending before the NSF, the National Institute of Drug Abuse, and the National Institute of Mental Health to continue research on monkeys' drinking, drug and jaw clenching habits. If Dr. Hutchinson is successful in this new grantmanship attempt, he would receive an additional $150,000 of taxpayers' money.

"The funding of this nonsense makes me almost angry enough to scream and kick or even clench my jaw.

"Dr. Hutchinson's studies should make the taxpayers as well as his monkeys grind their teeth. In fact, the good doctor has made a fortune from his monkeys and in the process made a monkey out of the American taxpayer.

"It's time for the federal government to get out of this 'monkey business.' In view of the transparent worthlessness of Hutchinson's study of jaw-grinding and biting by angry or hard-drinking monkeys, it's time we put a stop to the bite Hutchinson and the bureaucrats who fund him have been taking out of the taxpayer."

Proxmire said that the public is urged to write him in Washington with suggestions for the "Golden Fleece of the Month" for May.

APPENDIX B — Opinion Of The United States Court of Appeals For The Seventh Circuit Dated June 30, 1978.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Nos. 77-1677 and 77-1755
RONALD R. HUTCHINSON,

Plaintiff-Appellant,

v.

WILLIAM PROXMIRE and MORTON SCHWARTZ,

Defendants-Appellees.

Appeal from the United States District Court for the Western District of Wisconsin. No. 76-C-257.
George N. Leighton, *Judge*
Northern District of Illinois, sitting by designation.

ARGUED JANUARY 9, 1978 — DECIDED JUNE 30, 1978

Before CASTLE, *Senior Circuit Judge,* WOOD, *Circuit Judge,* and EAST, *Senior District Judge.**

CASTLE, *Senior Circuit Judge.* This civil suit against a United States Senator and his legislative aide for damages arising from one of the Senator's monthly "Golden

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* Honorable William G. East, Senior United States District Judge for the District of Oregon, is sitting by designation.

Fleece" awards involves the interplay of the immunities provided by the Speech or Debate Clause and the first amendment. The issues on appeal are (1) whether the alleged activities of the congressional defendants were within the legitimate legislative sphere and thus absolutely immune from suit and (2) to the extent those activities are not absolutely protected by the Speech or Debate Clause, whether the statements complained of are protected by the qualified privilege of the first amendment. The district court found that the combination of the absolute and qualified immunities completely shielded the defendants and granted their motion for summary judgment. We affirm.

I.

The facts as alleged by plaintiff are fully stated in the opinion below. *Hutchinson v. Proxmire,* 431 F. Supp. 1311 (W.D. Wis. 1977), and will be briefly summarized here. Defendant William Proxmire is a United States Senator from Wisconsin who serves on the Senate Committee on Appropriations. In March, 1975, Senator Proxmire announced in a speech on the Senate floor that he was establishing his "Golden Fleece of the Month Award" the aim of which was to point out examples of wasteful government spending. Senator Proxmire's legislative aide, Morton Schwartz, was assigned to identify and investigate possible "Fleece" candidates.

After a review of agency documents and discussions with the various agencies' officials, the defendants decided they would give a Golden Fleece award to the National Science Foundation (NSF), the Office of Naval Research (ONR), and the National Aeronautics and Space Administration (NASA) for spending $500,000 to fund research by plaintiff Dr. Ronald Hutchinson into the causes of animal and human aggression. Defendants delivered a press release to the Senate Service Depart-

ment on April 15, 1975 for release April 18 which, in essence, was the text of a speech scheduled to be given before the Senate by Senator Proxmire on April 18.[1] In his speech, Senator Proxmire characterized the research as merely studying why "rats, monkeys and humans bite and clench their jaws." Also, on or about April 15, 1975, Schwartz telephoned Dr. Hutchinson to inform him of the upcoming award and to verify the information contained in the speech. In rebuttal, Dr. Hutchinson then issued his own press release also dated April 18, 1975. In May, 1975, Senator Proxmire sent approximately 100,000 newsletters to his constituents and others summarizing the Golden Fleece Award.[2] Later in 1975, in addition to other interviews, Senator Proxmire appeared on a Milwaukee radio show and the Mike Douglas television show to discuss the Golden Fleece Awards including the one given to NSF, ONR, and NASA.[3] Following the April 18, 1975 announce-

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[1] The press release is attached to this opinion as Appendix A.

[2] This newsletter is attached as Appendix B. A second newsletter repeated the substance of the first and stated that all funding of the studies involved had been ended.

[3] The relevant dialogue from the Mike Douglas Show is set forth below:

> Mike Douglas: You gave another award to a research project studying angry rats.
>
> Senator Proxmire: Well it was angry monkeys, rats and humans. It was a study that cost $500,000 to find out why people, rats and monkeys clench their jaws. They found out they clench their jaws when they were angry, when they were prodded by sticks, when they were hungry, and they didn't clench their jaws as much if they had been drinking.
>
> Mike Douglas: You know we're laughing at this but this is really really.
>
> Senator Proxmire: Oh it's terrible.

ment of the award, plaintiff alleges defendant Schwartz made several followup phone calls to NSF, ONR, and the National Institute of Drug Abuse (NIDA), and possibly other agencies, encouraging them to terminate the funding of Dr. Hutchinson's research.

Dr. Hutchinson filed this action seeking $8,000,000 in damages for injury to his reputation, for physical illness, mental distress, invasion of privacy, and loss of existing and prospective economic advantage. Defendants, claiming immunity from suit, moved for summary judgment and filed numerous supporting documents. Plaintiff opposed the motion with equally voluminous documentation. The district court, in a scholarly opinion, granted Senator Proxmire's motion for summary judgment and later dismissed the suit against Schwartz. This appeal followed.[4]

II.

Several recent cases have interpreted the scope of the absolute immunity provided legislators and their aides

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[4] The district court granted Senator Proxmire's motion for summary judgment on April 22, 1977 (77-1677) and the motion to dismiss defendant Schwartz on June 22, 1977 (77-1755). As stated below, see note 5 *infra*, since we find the legal status of the defendants to be identical, we affirm both rulings for the same reasons.

We note that in cases involving the assertion of the immunities raised here, dismissal or summary judgment, when proper, is necessary to prevent the possible harassment of a full-fledged lawsuit; the precise harassment the legislative and first amendment immunities were designed to prevent. *See Dombrowski* v. *Eastland,* 387 U.S. 82, 85 (1967) (Speech or Debate Clause protects legislators from the burden of defending against a lawsuit as well as from the results of the lawsuit); *Grzelak* v. *Calumet Publishing Co., Inc.,* 543 F.2d 579, 582 (7th Cir. 1975) (summary judgment minimizes the chilling effect libel suits have on first amendment rights).

under the Speech or Debate Clause in suits stemming from investigations.[5] While actual speech in either House is unquestionably protected, the Clause also protects other acts by representatives when those acts are found to be within the "legitimate legislative sphere." *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491, 503 (1975); *Gravel v. United States*, 408 U.S. 606 (1972).[6] The act of investigation is an "appropriate auxiliary to the legislative function" and legislators have been found to be within the legislative sphere when the subject of the investiga-

[5] *See* Comment, *McSurely* v. *McClellan: Civil Suits Under the Speech or Debate Clause*. 71 Nw.U.L.Rev. 783 (1977) [hereinafter cited as Northwestern Comment].

The Speech or Debate Clause states: "for any Speech or Debate in either House, they [members of Congress] shall not be questioned in any other Place." U.S. Const. art. I, §6. Generally, legislative aides are entitled to the same Speech or Debate Clause protection as the representatives they serve. *Gravel* v. *United States*, 408 U.S. 606, 618 (1972). In the present action, we view the immunity available to Senator Proxmire and his aide, Morton Schwartz, to be identical.

[6] The Court stated in *Gravel*:

> The heart of the Clause is speech or debate in either House. Insofar as the Clause is construed to reach other matters, they must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House.

408 U.S. at 625. *See generally* Reinstein & Silvergate. *Legislative Privilege and the Separation of Powers*, 86 Harv. L. Rev. 1113 (1973).

tion was one on which Congress could legislate and when the information sought from material witnesses furthered that subject. *McGrain v. Dougherty*, 273 U.S. 135, 174, 177 (1927); *Watkins v. United States*, 354 U.S. 178, 187 (1957).[7] However, even where the investigation is within the legislative sphere, absolute immunity does not attach to the improper dissemination of actionable information outside Congress, *Doe v. McMillan*, 412 U.S. 306, 316 (1973); *Gravel v. United States, supra* at 625, nor to illegal or unconstitutional acts committed during the investigation. *United States v. Brewster*, 408 U.S. 501, 526 (1972); *Dombrowski v. Eastland*, 387 U.S. 82 (1967).[8] Equipped with these basic principles, we will now determine if absolute legislative immunity bars suit upon the acts complained of by the plaintiff. For the purposes of analysis, we divide the allegations in this case into four separate acts: (1) the follow-up phone calls to administrative agencies; (2) the press release of the speech; (3) the newsletters; and (4) the television, radio, and other interviews.

[7] We find unpersuasive plaintiff's argument that these cases do not involve Speech or Debate immunity but only the power of Congress to investigate. Language from *McGrain* and *Watkins* is frequently used in Speech or Debate cases involving investigations as the test for application of legislative immunity. *E.g. Eastland v. United States Servicemen's Fund, supra* at 505-06; Northwestern Comment, *supra* note 5 at 788 n. 39.

[8] An example of a civil suit based upon claims of unconstitutional acts is *McSurely v. McClellan*, 553 F.2d 1277 (D.C. Cir. 1976) (en banc), *cert. dismissed as improvidently granted sub nom., McAdams v. McSurely*, ... U.S. .....; 46 U.S.L.W. ..... (June 26, 1978). It is not contended that the tort claims here are of constitutional dimensions. *See Paul v. Davis*, 424 U.S. 693 (1976).

1. *Follow-up Phone Calls to Agencies*

Plaintiff agrees that the investigative actions by defendants in gathering information on public spending from administrative agencies is not actionable under the Speech or Debate Clause since the investigation was within the legislative sphere. *McGrain v. Dougherty, supra.* However, Dr. Hutchinson argues that when the defendants made the phone calls to the agencies encouraging them to terminate the research grants, they exceeded the legitimate information gathering protected by legislative immunity. The phone calls, plaintiff alleges, were made for the purpose of influencing the agencies and not for the gathering of information. In response, defendants maintain that the follow-up contact with the agencies was part of the legislature's oversight function and thus should be accorded Speech or Debate protection.

The thrust of legislative immunity is the protection of the "deliberative and communicative processes" of representatives *Gravel v. United States, supra* at 625. It can be argued that each of the nonlegislative functions of Congress, *i.e.*, investigative, oversight, informing, assist representatives in their legislative deliberations and communications. However, the Supreme Court has specifically stated that contact with administrative agencies is normally too far removed from the legislative sphere to be absolutely protected:

> Members of Congress are constantly in touch with the Executive Branch of the Government and with administrative agencies — they may cajole, and exhort with respect to the administration of a federal statute — but such conduct, though generally done, is not protected legislative activity. *United States v. Johnson* [383 U.S. 169 (1966)] decided at least this much.

Gravel v. United States, supra, at 625. *See also McSurely v. McClellan, supra* note 8 at 1285-86. Thus, while there may be cases where the postinvestigation contact with administrative agencies is so integral to the investigation or other protected activities that application of absolute immunity would be compelled, the phone calls to NSF, NASA, and NIDA in this case cannot be accorded Speech or Debate protection.[9]

2. *Press Release, Newsletters, Television and Radio Comments*

To determine whether the remaining allegations of plaintiff are actionable under the Speech or Debate Clause, we must explore the limits of permissible public dissemination of information by a representative. The Supreme Court has rejected the argument that the "informing function" of Congress requires absolute immunity for all public distribution of information. *Doe v. McMillan, supra* at 316. *Doe* held that the Speech or Debate Clause protected representatives and their legislative aides from suit for voting to authorize the public distribution of an actionable committee report. However, the Court further held that absolute immunity was not automatically available to the Public Printer and Superintendent of Documents who actually distributed the report and remanded the case for a determination of whether the "legitimate

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[9] The district court did not specifically address the Speech or Debate status of the follow-up phone calls. It appears, however, that the court below viewed these actions as merely a part of the total investigation and therefore absolutely privileged. 431 F. Supp. at 1321-22. In light of the language in *Gravel,* we must disagree.

legislative needs" of Congress had been exceeded.[10] Thus, while the Supreme Court has recognized that the informing function of Congress is sufficiently important to warrant Speech or Debate immunity for some public dissemination of information, *Id.* at 317, 328 (Douglas, J., concurring), 333 (Blackmun, J., concurring and dissenting), 341 (Rehnquist, J., concurring and dissenting), the distribution outside Congress must serve legitimate legislative needs to afford the actual distributor absolute immunity. The key factor in determining the amount of distribution that is within legislative needs is the extent of the dissemination. *Id.* at 324.[11]

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[10] On appeal after demand, *Doe v. McMillan,* 566 F.2d 713 (D.C. Cir. 1977), *cert. denied,* 98 S.Ct. 1607 (1978), the D.C. Circuit upheld the district court's finding that the routine distribution of the actionable report "did not exceed the legitimate legislative needs of Congress." *Id.* at 715. *See also Gravel v. United States, supra* at 625 (Senator's direct arrangements with a private printer to publish classified information was "in no way essential to the deliberations of the Senate").

It appears that while the representatives and their legislative aides are automatically immune from suit when authorizing public dissemination of information, both can become subject to showing "legitimate legislative needs" if they actually distribute actionable material outside Congress. In the latter instance, representatives and their legislative aides are treated in the same manner as non-legislative functionaries such as the Public Printer. *See Doe v. McMillan,* 566 F.2d at 715 n.1. We assume, according to plaintiff's allegations, that defendants actually distributed the actionable materials here and cannot claim to have merely "authorized" their distribution.

[11] While the extent of the public dissemination was the only factor noted by the Supreme Court in *Doe,* implicit recognition was also given to the importance of the type

Following the particularized inquiry into the legislatively necessary extent of public distribution outlined in *Doe,* we agree with the district court that the press release in this case was protected by absolute immunity. It is uncontested that the release, which is virtually identical to the speech by Senator Proxmire, was routinely distributed to the Senator's general media list which was placed on file in the Senate Service Department (Shuman Affidavit ¶¶ 8-11). The release merely served to call attention to the speech which was in the public record.[12] Given the enormous amount of material addressed by Congress each day, strategic press releases may serve to alert a representative's colleagues about a matter of particular importance as well as to inform the appropriate federal agencies and the public who can then comment on proper legislative action. We find the limited facilitation of press coverage of congressional action in this case to be protected by the Speech or Debate Clause. *Cf. Consumer's Union of United States, Inc. v. Periodical Correspondents' Association,* 515 F.2d 1341, 1350-51 (D.C. Cir. 1975), *cert. denied,* 423 U.S. 1051 (1976) (management of congression-

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[11] (Continued):
of information being distributed; *i.e.,* committee reports, floor speeches, proposed legislation. Presumably, certain types of information would require greater public distribution to properly serve legislative needs.

[12] Plaintiff claims the press release, dated April 18, 1975, was actually made public April 15, three days before the speech. Assuming, as we must, that plaintiff is correct, we do not see how the timing of the release affects this case. There is no claim that Senator Proxmire attempted to create absolute immunity after the fact by reading the release in the Senate. The wording of the press release belies any such contention.

al press galleries, though entrusted to private association, is protected by the Speech or Debate Clause).[13]

We also find that the Speech or Debate Clause protects any otherwise actionable material contained in newsletters mailed to Senator Proxmire's constituents. As noted above, the informing function of Congress was given limited Speech or Debate protection by the Supreme Court in *Doe v. McMillan, supra.* If the informing function, even though limited, is to be accorded any absolute immunity, it must be in a case such as this. Senator Proxmire's newsletter informed his constituents of his actions in connection with overseeing public funds which were part of his general duties as a Senator and his particular responsibilities as a member of the Senate Committee on Appropriations. Denying a representative protection for newsletters to his constituents in circumstances such as this would effectively isolate the legislator from the people who elected him. *Id.* at 333 (Blackmun, J., concurring and dissenting). The subject matter and language of the newsletter make this case factually distinct from *Doe. Id.* at 328-29 (Douglas, J., concurring).

However, any defamatory remarks made by Senator Proxmire in television, radio, and other interviews are

[13] The district court held that the "press release, in a constitutional sense, was no different than would have been a television or radio broadcast of his speech from the Senate floor." 431 F.Supp. at 1325. This statement might be an overstatement since it is unlikely that all exact duplications of congressional speeches would enjoy the unquestioned absolute immunity accorded actual speech in the House or Senate. See note 6 *supra.* However, we agree with the district court that the form of distribution of the questioned material has an effect upon the extent to which its dissemination can still be considered to serve legislative needs.

not protected by absolute immunity. We view this form of public dissemination of information, absent special circumstances, to be too far removed from serving legitimate legislative needs to be within the limited reach of the protected informing function. Such methods of reaching the public are generally not necessary to carry out a representative's informing function and are more frequently used for political purposes. *United States v. Brewster, supra* at 512. While there might be a case where distributing actionable information through television and radio interviews would be viewed as serving legislative needs, the type of distribution alleged here does not suggest that situation.

Finding that television and radio interviews and the follow-up telephone conversations with administrative agencies urging the cut-off of funds are not absolutely immune under the Speech or Debate Clause, we must now determine whether the statements made in those communications are protected by the qualified privilege of the first amendment right to free speech.

III.

Regarding the statements which were unprotected by an absolute Speech or Debate immunity, the court below after careful analysis, found (1) that Dr. Hutchinson was both a public official and public figure and there was no showing of "actual malice" under the doctrine of *New York Times v. Sullivan,* 376 U.S. 254 (1964) and (2) that even if Dr. Hutchinson was a private person, the statements did not constitute defamation under the applicable local law. 431 F. Supp. 1325-33. After having independently examined the record, *Fadell v. Minneapolis Star and Tribune Co., Inc.,* 557 F.2d 107, 108 (7th Cir.), *cert. denied,* 98 S. Ct. 508 (1977), we agree with the district court that summary judgment was proper based upon first amend-

ment grounds. Consequently, we need not decide whether the statements were actionable defamation under local law.

We agree with the district court that Dr. Hutchinson is a public figure and consequently must show that any false, defamatory statements were made with "actual malice," *i.e.*, actual knowledge that the statements were false or reckless disregard of their truth or falsity. *New York Times v. Sullivan, supra* at 279-80. *See Curtis Publishing Co. v. Butts,* 388 U.S. 130 (1967). Public figures are those who (1) have the appropriate status which either exists by their position alone or is achieved by their voluntarily thrusting themselves into the " 'vortex' of an important public controversy" and (2) have "sufficient access to the means of conterargument to be able to 'to expose through discussion the falsehood and fallacies' of the defamatory statements." *Id.* at 155. While government employees and contractors by their positions alone do not generally have such "persuasive power and influence that they are deemed public figures for all purposes," *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 345 (1974), the nature and extent of an individual's participation in the particular matter may make him a public figure for that issue. *Id.* at 352.

Here, there is no question that Dr. Hutchinson had actively solicited federal grants to pursue his research and had secured a substantial amount of public funds by his applications. (Defendants' Exhibits 82b, 83). The plaintiff had also published numerous articles regarding his work (Plaintiff's Exhibits 64-96), and stories regarding his research had appeared several times in local papers. (Defendants' Exhibits 47-51). In addition to his public status as to his research, it is evident from the record that plaintiff had sufficient access to the media to rebut any defamatory falsehood. Dr. Hutchinson's answering press release was quoted in detail in the same stories

which initially reported the Golden Fleece Award. (Plaintiff's Exhibits 32-39). Thus, Dr. Hutchinson had the appropriate status and access to the means of rebuttal to be considered a public figure with regard to the propriety of his research. *See Adey v. United Action for Animals, Inc.,* 361 F. Supp. 457, 460 (S.D.N.Y. 1973), *aff'd,* 493 F.2d 1397 (2d Cir.), *cert. denied,* 419 U.S. 842 (1974) (NASA research scientist is public figure).[14]

Having found the plaintiff to be a public person and therefore subject to the *New York Times* standard, the district court granted summary judgment after finding that there was no issue of material fact as to whether the defendants had actual malice. 431 F. Supp. 1329-30. In order to show actual malice, plaintiff must prove by clear and convincing evidence that defendants had actual knowledge of the falsity of their statements or that defendants acted with a "high degree of awareness of . . . probable falsity." *St. Amant v. Thompson,* 390 U.S. 727, 730-31 (1968), *Gertz v. Robert Welch, Inc., supra* at 342. We agree with the district court that, upon this record, there

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[14] In light of our decision that Dr. Hutchinson is a public figure, we need not decide whether the district court was correct in holding that plaintiff was also a public official. 431 F.Supp. at 1327.

Time, Inc. v. Firestone, 424 U.S. 448 (1976), cited by plaintiff, is factually distinct from the present case. There, the Court found that Mrs. Firestone was not a public figure since she did not thrust herself into the forefront of a public controversy in order to influence its reolution by her divorce proceedings and related press conferences. *Id.* at 454 & n.3. In contrast, here Dr. Hutchinson was not forced to seek public funds and plaintiff's numerous articles and news stories which preceded his rebuttal press release demonstrate his public affirmation of the soundness of the research and the continued public funding thereof. *See also Gertz v. Robert Welch, Inc., supra* at 345.

is no question that defendants did not have knowledge of the actual or probable "falsity" of their statements.[15]

Dr. Hutchinson's main argument in this regard is that while failure to fully investigate generally does not establish reckless disregard for the truth, *St. Amant v. Thompson, supra,* defendants were on notice of the possible falsehoods since they possessed agency reports supporting the type of research and its cost. (ONR letter, Plaintiff's Exhibit 9 to Shuman Deposition.) In contrast, defendants' exhibits include correspondence from agencies which criticize plaintiff's research technique and project costs. (Defendants' Exhibit 90.) At best, this could be read to show there was a dispute as to the value of the research. This dispute by itself, however, is not sufficient to raise a question of material fact as to whether defendants had knowledge that their statement of opinion regarding the value of the research was actually or probably "false." In addition, it is unchallenged that defendants spent many hours investigating and verifying their information. (Schwartz Affidavit ¶¶ 10-20.) Defendants even telephoned Dr. Hutchinson before the press release was issued to inform him of its content. (Hutchinson Deposition pp. 389-90.) Defendants can also point to their extensive researching of Dr. Hutchinson's application for federal grants and contracts as support for their opinions regarding plaintiff's "grantsmanship." (Defendants' Exhibits 82b, 83.) Under these circumstances, plaintiff has not presented facts which could demonstrate that defendants acted with a "high degree of awareness of . . . probable falsity." *St. Amant v. Thompson, supra* at 730-31. Therefore, we find that there is no genuine issue as to whether the defendants had actual malice in the constitutional sense and that summary action by the district court was proper. *See Grzelak v. Calumet Publishing Co. Inc., supra* note 4 at 583.

Finally, plaintiff argues that even though the first amendment may shield the defendants from liability for defamation, the district court erred in not allowing a trial upon the other wrongs alleged in the complaint, *i.e.,* interference with contractual relations, intentional infliction of emotional anguish, and invasion of privacy. We view these additional allegations of harm as merely the results of the statements made by the defendants.[16] If the alleged defamatory falsehoods themselves are privileged, it would defeat the privilege to allow recovery for the specified damages which they caused.

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[15] We note that the statements in the interviews constitute a personal opinion as to the value of plaintiff's work, rather than false statements of fact and thus may not be defamatory in a constitutional sense. *See Greenbelt Cooperative Publishing Ass'n, Inc. v. Bresler,* 398 U.S. 6, 14 (1970). While the statements in the press release intimating that Dr. Hutchinson had made a personal fortune and that the research was "perhaps duplicative" may be defamatory falsehoods, that document, together with the newsletters, is absolutely immune under the Speech or Debate Clause. See Part II *supra.* In any event, we find the allegedly defamatory statements, including any action which may be premised on the documents being misleading, to be privileged under the first amendment.

[16] Although the harm caused by the follow-up phone calls might be argued to be independent of the defamatory statements, we see no constitutional distinction in their treatment. The torts allegedly stemming from the phone calls, interference with contractual relations and interference with prospective advantage, are based upon "malice" or other improper intent. W. Prosser, Law of Torts, §§ 129, 130 (4th ed. 1971). Where the constitutional right to free speech is involved, as it is here, the *New York Times* standard would be applicable to such an intent inquiry.

For the reasons stated above, the judgments of the district court are

AFFIRMED.

APPENDIX A

April 18, 1975 Press Release

Office of

SENATOR WILLIAM PROXMIRE

Wisconsin

FOR RELEASE AFTER 6:30 A.M. FRIDAY, APRIL 18, 1975

Senator William Proxmire (D.—Wis) announced on Friday, "My choice for the Golden Fleece Award for the biggest waste of taxpayers' money for the month of April goes jointly to the National Science Foundation, National Aeronautics and Space Administration and the Office of Naval Research for spending almost $500,000 in the last seven years to determine under what conditions rats, monkeys and humans bite and clench their jaws. From the findings of these studies it is clear that the Government paid a half million dollars to find out that anger, stopping smoking, and loud noises produce jaw clenching in people."

The Wisconsin Senator said, "This is the second in a series of 'fleece of the month' awards which will climax in a Biggest Waste of the Year Award.

"All this money was given to Dr. Roland [sic] R. Hutchinson of Kalamazoo State Hospital in Michigan. Last year alone the good doctor spent over $200,000 of which more than $100,000 were federal funds. And what are some of the other results reached by these research projects in the last seven years?

"Dr. Hutchinson told NASA that people get angry when they feel cheated and tend to clench their jaws or even scream and kick. NSF learned that Dr. Hutchinson's monkeys became angry when they were shocked and would try to get away from the shock. In addition, NSF was informed that drunk monkeys do not usually react as quickly or as often as sober monkeys and that hungry monkeys get angry more quickly than well-fed monkeys.

"The Office of Naval Research appears to have gotten the same type of so-called research as did the NSF and NASA.

"It is very interesting to trace the history of these extremely similar and perhaps duplicative projects. In 1967, NSF gave Dr. Hutchinson $44,700 to study 'Environmental and Physiological Causes of Aggression.' For two years, Dr. Hutchinson studied the biting reactions of monkeys when they received electric shocks. He also compared their reaction while being given a number of different drugs as alcohol and caffeine. In 1969, the NSF gave Dr. Hutchinson another $26,000 to continue these experiments. He received another grant, this one for $51,200 in 1970 from the NSF.

"By this time Dr. Hutchinson was ready to extend his work to human biting and jaw clenching. In 1970, Dr. Hutchinson received a grant which ran for five years from the ONR to continue 'research on subhuman primates to determine the environmental, physiological and biochemical factors responsible for the maintenance of aggressive behavior and systematic replication of results obtained in primates extended to human subjects.' Total funding from the Navy ran to $207,000.

"During this period, Dr. Hutchinson applied for and rereceived a $50,000 grant from NASA to develop measurements of latent anger or aggression in humans by means of jaw-clenching. In addition, Dr. Hutchinson received

his fourth NSF grant in 1972 for $51,800 in order to continue his experiments on monkeys and extend the work to human jaw-clenching.

"Dr. Hutchinson, who in addition to being Research Director at Kalamazoo State Hospital, is also an Adjunct Professor at Western Michigan University and President of his own non-profit Foundation for Behavior Research, has proposals presently pending before the NSF, the National Institute of Drug Abuse, and the National Institute of Mental Health to continue research on monkeys' drinkink, drug and jaw clenching habits. If Dr. Hutchinson is successful in this new grantsmanship attempt, he would receive an additional $150,000 of taxpayers' money.

"The funding of this nonsense makes me almost angry enough to scream and kick or even clench my jaw.

"Dr. Hutchinson's studies should make the taxpayers as well as his monkeys grind their teeth. In fact, the good doctor has made a fortune from his monkeys and in the process made a monkey out of the American taxpayer.

"It's time for the federal government to get out of this 'monkey business.' In view of the transparent worthlessness of Hutchinson's study of jaw-grinding and biting by angry or hard-drinking monkeys, it's time we put a stop to the bite Hutchinson and the bureaucrats who fund him have been taking out of the taxpayer."

Proxmire said that the public is urged to write him in Washington with suggestions for the "Golden Fleece of the Month" for May.

APPENDIX B

May, 1975 Newsletter

ROMANTIC LOVE STUDIED

Each month I have decided to offer a "golden fleece" award to the organization or person who has most utterly wasted your tax dollars.

Last month's award went to the National Science Foundation for a study of why people fall in love. For $84,000 the researchers were supposed to find out how people grow dependent upon each other in what they called "romantic love."

Not only is this a question that cannot be answered, like what is infinity, I'm not sure we want an answer. There should be some mysteries in life.

A BITE OUT OF YOUR POCKETBOOK

This month the award is shared jointly by the National Science Foundation, National Aeronautics and Space Administration and the Office of Naval Research. These three organizations have put up $500,000 of your tax money to reach the astounding conclusion that people and monkeys clench their jaws when angry or forced to stop smoking or confronted with loud noise.

In seven years of work by Dr. Ronald R. Hutchinson of Michigan, your money was used to discover that people get angry when they feel cheated and they tend to clench their jaws or even scream and kick. Did you know that? Did you know that monkeys become angry when they are given electric shocks? Or that drunk monkeys do not react as quickly as sober monkeys? That's what your taxes paid for!

Dr. Hutchinson has received one grant after another from various federal bureaucracies to study these earth shaking problems. He has examined crayfish, wasps, boa constrictors, turtles, alligators, opossums, foxes, pigeons, rats, monkeys and humans to discover under what circumstances they show signs of being angry.

TESTS ON ANIMALS

He has "stimulated" the animals by using physical blows, electric tail shocks, intense heat, brain probing, air blasts, foot shocks and loud noises. He has influenced them with morphine, tranquilizers, food, alcohol, caffeine and in the case of humans, with money.

He graduated from animals to humans in 1970. That's when he began to conclude that humans bite and clench their jaws under stress. And that when they feel cheated, they react by screaming and kicking on occasions.

These studies are continuing and several new proposals, if accepted, will mean another $150,000 for this program.

If this use of your tax money makes you want to kick and scream or clench your jaws, then join the club. The good doctor has made a monkey out of the federal bureaucrats.

I've told these government agencies it's time to get out of this "monkey business" and put an end to worthless studies be they scientific or social.

If you have any suggestions for my next "golden fleece" award, please write to me in Washington.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit